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Tackling Employment Discrimination With ADR: Does Mediation Offer a Shield for the Haves or Real Opportunity for the Have-Nots?

Michael Z. Green†

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† Professor of Law, Texas Wesleyan University School of Law. My initial thoughts for this article were presented at the Law and Society annual meeting held in Chicago, Illinois on May 29, 2004. This article follows from a presentation I made on October 9, 2004 at "America, Race, and Law at the Crossroads: The Second National People of Color Legal Scholarship Conference," held at George Washington University Law School, where I participated as a member of a panel on Upcoming Challenges in Employment Discrimination Law. I would like to thank Alfreda Robinson for her tireless efforts in coordinating that conference. I would also like to thank the moderator, D. Aaron Lacy, for making the panel run smoothly and for coordinating the papers that developed as part of that panel, all of which have become a part of this publication. I value the thoughtful contributions of other members of the panel: Suzette M. Malveaux, Cynthia Nance, Shawn D. Vance, and L. Darnell Weeden. I also thank the Texas Wesleyan University Law School Research Grant program for its financial support, and the research efforts of Texas Wesleyan law students Adam Burney, Shelley Jeri, Eunice Kim and Sandra Cortes. As always, I remain eternally grateful to Margaret Green for her constant encouragement.

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Prologue: Imagine the following scenario. A black male employee, Walter, has been subjected to vicious racial insults in the workplace. Friends and family have tried to console him. The continuing harassment and verbal assault has come from his direct supervisor. He felt his only recourse was to file a complaint charging the supervisor with employment discrimination based on race. He has struggled unsuccessfully to find a lawyer and started taking medication to handle his depression.

A government agency that processes employment discrimination charges has suggested that it might be helpful to use mediation. During the mediation, the mediator discovers that Walter’s main concern is moving on with his life and that all Walter wants is for the verbal insults to stop and an apology from his supervisor. The mediator believes that Walter has a strong case for recovery under law and tells Walter that he should consider obtaining legal advice. Walter tells the mediator that his peace of mind is all he really wants. If Walter gets an apology and no longer has to deal with the verbal insults, his only desire is for all of this to go away. The employer agrees to transfer the supervisor so that he no longer supervises Walter, and the supervisor will give Walter a written apology and say it to him orally.

Some outsiders might view this as a nice, quick, and private resolution of an employment dispute based upon the desires of the parties. Others might think the mediator failed Walter by letting Walter agree to settle a case when societal notions of justice, as established by legal norms, would suggest that Walter was entitled to much more from his employer and could have obtained it in the court system. Critics have suggested that we not rush to suppress these kinds of conflict; instead, we must allow the courts to handle them:

Yet, in a society like ours, tension among groups may be normal, and not a sign of social pathology. With a history of slavery, conquest, and racist

immigration laws, the United States today exhibits the largest gap between the wealthy and the poor of any Western industrialized society. Until recently, Southern states segregated school children by race and criminalized marriage between whites and blacks. Surely, in such a society, one would expect the have-nots to attempt to change their social position (by legal or illegal means), and the haves to resist these attempts. Conflict is a logical and expected result.¹

Whether mediation just offers a second-class system of justice for employees like Walter that is aimed at suppressing their conflicts rather than offering a just result presents one of the growing concerns about the mediation of employment discrimination claims.

I.

INTRODUCTION:

MARKERS FOR JUSTICE AND MEDIATION OPPORTUNITIES IN THE NEW MILLENNIUM

The year 2004 represented a significant landmark for seeking justice in our court system as the fifty-year anniversary occurred for the legendary *Brown v. Board of Education*² Supreme Court decision and its ban on separate-but-equal education. A significant historical reference for employees seeking justice in our court system also transpired in 2004 with the arrival of the fortieth anniversary of Title VII of the Civil Rights Act of 1964,³ which banned employment discrimination on the basis of race, color, sex, religion, and national origin.⁴ It also signaled the thirtieth anniversary of a noteworthy article by Marc Galanter that illuminated many concerns about our legal system by questioning whether the haves (referred to as “repeat player” entities with extensive resources for litigation) in our society control the litigation results and opportunities for justice of the have-nots (referred to as “one-shotter” litigants unfamiliar with the litigation process and with limited resources).⁵

Despite such noteworthy markers for justice in 2004, we still have many concerns today. As Supreme Court Justice Sandra Day O’Connor noted just in 2003, “[t]here is sad evidence all across the nation that a

1. Richard Delgado, *Goodbye to Hammurabi: Analyzing the Atavistic Appeal of Restorative Justice*, 52 STAN. L. REV. 751, 770-71 (2000) (footnotes omitted).

2. 347 U.S. 483 (1954).

3. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in pertinent part at 42 U.S.C. §§ 2000e-2 to 2000e-17 (2004)).

4. 42 U.S.C. §§ 2000e-2(a) (1) to (2) (2004).

5. Marc S. Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 97-98, 106-07 (1974) (defining a “repeat player” as an individual or entity that has “had and anticipates repeated litigation” and “has low stakes in the outcome of any case, and which has the resources to pursue its long-run interests” and defining a “one-shotter” as those having limited resources to pursue litigation and “only occasional recourse to the courts”).

substantial number of our citizens believe our legal and judicial system is unresponsive to them . . . that too often equal justice is but an unrealized slogan.”⁶ While appreciating that “in spite of its problems the American justice system is still the best in the world,” a recent study identified that “nearly half of those surveyed believed that the courts do not treat all ethnic and racial groups the same.”⁷

The quote in the prologue of this Article by Richard Delgado, a consistent critic of the use of informal methods of alternative dispute resolution (ADR),⁸ suggests a possible focus for those concerned about our judicial system. If we recognize that conflict is a necessary byproduct of our system of justice, we may then proceed to design effective conflict resolution systems that fairly resolve those disputes.⁹ Unlike Delgado, who has indicated recently that he views mediation specifically with significant disdain and contempt,¹⁰ in this Article I assert that mediation offers great potential for the fair resolution of employment discrimination claims, especially given the difficulties that employees face when attempting to adjudicate their discrimination claims in the formal court system.¹¹ Despite his fascination with the formal court system and the public values that it purportedly guarantees, Delgado has even admitted that the reasons for his support of formal court resolutions may “not necessarily [be] true” and that he agrees “with informality being better than formality” when the courts and judges appear to be hostile to certain types of claims.¹² Employment discrimination claims continue to be one area where Delgado’s reasons for formal court resolutions do not exist. The results from studies of Title VII

6. See Anne Gearan, *Work for Racial Justice, O'Connor Tells Law School's Grads*, S. FLA. SUN-SENTINEL, May 26, 2003, at 3A.

7. Dennis Archer, *Eradicating Racial and Ethnic Bias in the Courts*, 1 MINORITY TRIAL LAW. 1 (Spring 2003).

8. See, e.g., Richard Delgado, *Alternative Dispute Resolution Conflict as Pathology: An Essay for Trina Grillo*, 81 MINN. L. REV. 1391, 1400, 1402 (1997) [hereinafter Delgado, *Conflict as Pathology*]; Delgado, *supra* note 1; see also Phyllis E. Bernard, *Only Nixon Could Go to China: Third Thoughts on the Uniform Mediation Act*, 85 MARQ. L. REV. 113, 140 (2001) (referring to Delgado as the “principal proponent” of attacks on mediation because of power imbalances for “minorities in American society”).

9. See Lisa B. Bingham, *Self-Determination in Dispute System Design and Employment Arbitration*, 56 U. MIAMI L. REV. 873 (2002). Lisa Bingham has also raised concerns about dispute system design in commercial disputes. Lisa B. Bingham, *Control Over Dispute-System Design and Mandatory Commercial Arbitration*, 67 LAW & CONTEMP. PROBS. 221, 251 (2004) (asserting that arbitration systems created through adhesion agreements designed by the stronger party to bind the weaker party should be treated “with a healthy dose of skepticism” by the courts because they may “allow one party to nullify public policy as embodied in law”).

10. See Richard Delgado & Jean Stefancic, *The Racial Double Helix: Watson, Crick, and Brown v. Board of Education (Our No-Bell Prize Award Speech)*, 47 HOW. L.J. 473, 487 (2004) (“Courts kill stories—mediation kills dreams.”).

11. See *infra* text accompanying notes 20-31 (identifying the host of problems that employees have in trying to bring their discrimination claims to a successful resolution through the court system).

12. Delgado, *Conflict as Pathology*, *supra* note 8, at 1400.

cases suggest a court system and a judiciary that is hostile to employment discrimination claims both at the trial level and on appeal.¹³

Accordingly, this Article's thesis is that by the end of 2005, both victims of workplace discrimination and employers should move to embrace mediation as a potential mechanism for resolving their disputes.¹⁴ Given the difficulties with court resolution of employment discrimination claims, mediation can allow both parties to craft their own resolution rather than have judges or juries or even arbitrators make those decisions. With respect to resolution through mediation for more disputes involving claims under public statutes such as Title VII, some concerns have arisen. Whether mediators should be more involved in assessing and evaluating legal norms to bridge the gap between party self-determination and social justice through established legal norms while still maintaining their neutrality remains an issue of major debate.¹⁵ However, it is foolish to expect mediators involved in workplace disputes to deliver social justice, a concept that reflects society's norms, when mediation arises through private contracts that only reflect the norms of the individual parties, especially the party with the most bargaining power.

Nevertheless, to address the concerns that mediation may only represent a second-class system of justice for employees, certain procedures and design features must accompany any mediation process that the parties use to resolve Title VII claims. As part of an overall approach to a healthy conflict resolution system, mediation must include safeguards that support a realistic opportunity for legal representation, a fair selection of mediators from a core and critical mass of qualified people of color and women, and an opportunity for employees to have a role in its design of reasonable and balanced procedures. The court system, however, must still remain a viable and available option for participants in the mediation process. The potential

13. See *infra* text accompanying notes 20-31.

14. Suggesting that parties embrace mediation in resolving employment discrimination disputes may subject me to criticism for being a mediation romanticist. See Jeffrey W. Stempel, *Identifying Real Dichotomies Underlying the False Dichotomy: Twenty-First Century Mediation in an Eclectic Regime*, 2000 J. DISP. RESOL. 371, 385-86 (counseling against becoming a mediation romanticist). However, I am not a mesmerized zealot who thinks that mediation consists of some magic potion that will heal all that ails the employment discrimination dispute resolution process. See *id.* (criticizing those who believe in mediation "based on a romantic, almost theological view of the process rather than faith based on empirical evidence and substantive rationality" and asserting that "one should not be a . . . mediation romanticist"). Rather, I embrace mediation for employment discrimination disputes with the reservation that certain procedural and design requirements should be put in place to allow for employee self-determination and involvement in system design along with the option to pursue claims in the court system, if necessary, in the event that an employee decides that mediation cannot resolve the dispute.

15. See generally Jeffrey W. Stempel, *The Inevitability of the Eclectic: Liberating ADR from Ideology*, 2000 J. DISP. RESOL. 247 (describing the debate and asserting more support for the use of eclectic mediation which allows doses of evaluative forms of mediation); Stempel, *supra* note 14; Ellen A. Waldman, *The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence*, 82 MARQ. L. REV. 155 (1998).

for recourse through the court system casts a shadow over the parties' ability to bargain an effective resolution in mediation.¹⁶ Also, some disputes cannot be resolved through private mechanisms like mediation and will require a formal and public court resolution.¹⁷

Although I recognize and appreciate the important societal concern of having formal dispute resolution, I focus my approach to mediation of employment discrimination claims on what the disputants want and how to help them attain their highest level of needs or self-actualization.¹⁸ I believe that public and societal concerns about the way that employment discrimination claims should be justly resolved and how public resolutions help to guide the future conduct of employers can still be addressed despite the growing use of private resolution because there will be enough disputes that parties cannot resolve in mediation. Those matters will still get into the courts to allow for and address the public and societal concerns underlying

16. See James J. Alfini & Catherine G. McCabe, *Mediating in the Shadow of the Courts: A Survey of the Emerging Case Law*, 54 ARK. L. REV. 171, 172 n.6 (2001) (referring to the importance of legal norms in mediation and noting that the shadow "metaphor is borrowed (and altered) from an article that has become a classic in the ADR field, Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979)"); Jeffrey W. Stempel, *Forgetfulness, Fuzziness, Functionality, Fairness, and Freedom in Dispute Resolution: Serving Dispute Resolution Through Adjudication*, 3 NEV. L.J. 305, 347 n.149 (2003) [hereinafter Stempel, *Fuzziness*] (explaining how bargaining and negotiation involved in informal dispute resolution is dependent upon the "likely outcomes if [a] dispute is adjudicated to conclusion"); Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297, 308 (1996) [hereinafter Stempel, *Reflections*] (identifying the significance of having legitimate court options involving an "adjudicatory core to cast 'the shadow of law' that enables ADR and settlement to function effectively"); Rachel H. Yarkon, Note, *Bargaining in the Shadow of the Lawyers: Negotiated Settlement of Gender Discrimination Claims Arising From Termination of Employment*, 2 HARV. NEGOT. L. REV. 165, 166 n.3 (1997) (explaining that bargaining in the shadow of the law refers to an understanding of "how rules and procedures used in court for adjudicating disputes affect the bargaining process that occurs between [parties] outside the courtroom" and finding that "[i]n the . . . discrimination context, case law creates bargaining endowments that impact what parties will accept in settlement") (citation omitted).

17. See Vivian Berger, *Employment Mediation in the Twenty-First Century: Challenges in a Changing Environment*, 5 U. PA. J. LAB. & EMP. L. 487, 538 (2003) (finding that "certain cases ought to go through trial and appeal so as to create significant law to guide and bind interested persons in the future"); Carrie Menkel-Meadow, *What Will We Do When Adjudication Ends? A Brief Intellectual History of ADR*, 44 UCLA L. REV. 1613, 1623 (1997) (arguing for the necessity of adjudication to "generate rules and norms, and to exist as a final resort when the parties cannot resolve things themselves"); Jean R. Sternlight, *ADR is Here: Preliminary Reflections on Where It Fits in a System of Justice*, 3 NEV. L. J. 289, 303 (2003) (asserting the importance of a conflict resolution "system that contains multiple procedures (e.g. both litigation and mediation)").

18. According to motivational psychologist Abraham Maslow's assessment of needs, individual needs move along five levels of hierarchy starting with the basic need of food and shelter and ending with the need for self-actualization as the highest level of need that individuals in our society have. See Ann Hubbard, *Meaningful Lives and Major Life Activities*, 55 ALA. L. REV. 997, 1031 & n.220 (2004) (describing Maslow's hierarchy of needs including the highest need of "self-actualization, or the reaching of one's full potential") (citing ABRAHAM MASLOW, *HIERARCHY OF NEEDS* (1954); ABRAHAM MASLOW, *MOTIVATION AND PERSONALITY* (1954); ABRAHAM MASLOW, *TOWARD A PSYCHOLOGY OF BEING* (1962); ABRAHAM MASLOW, *A THEORY OF HUMAN MOTIVATION* (1968)).

the resolution of disputes brought pursuant to a federal statute aimed at eradicating workplace discrimination.¹⁹

In Part II, this Article describes the way in which employment discrimination disputants have increasingly used various forms of ADR, with mediation becoming the predominant choice. Part III explores the middle ground between two opposing views—those who expect too much out of mediators in terms of them delivering social justice and transforming relationships versus those who take too narrow a perspective regarding the roles mediators can play in mediation because of purported neutrality concerns. This Part suggests major opportunities for using mediation in resolving Title VII claims when the mediator's approach and orientation focuses on party self-determination while at the same time wrestling with the dynamics of social justice. In Part IV, the Article proposes a mediation design that can allow both the haves and the have-nots to effectively resolve their employment discrimination disputes. The Article concludes that the use of mediation as the primary ADR tool to tackle employment discrimination in the twenty-first century can represent an excellent choice if it involves the use of certain process guidelines and guarantees to make it fair for the have-nots.

II.

EMPLOYMENT DISCRIMINATION AND THE ROAD TO MEDIATION

Concerns about the legal justice system ring true especially for employment discrimination claimants as empirical studies demonstrate that these plaintiffs fare worse in the court system.²⁰ In 2000, employment

19. *But see* Sternlight, *supra* note 17, at 304 n.76 (addressing the issue as to who should decide which disputes should go into which process and asserting that “[b]ecause disputes and dispute resolution affect the public as well as disputants, . . . this [decision] should be, in part, a societal decision, and not merely left to disputants”). Nevertheless, parties can still proceed as private attorney generals in bringing lawsuits to address societal concerns about civil rights. *See generally* Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384 (2000) (suggesting that private enforcement of civil rights laws would be strengthened by allowing governmental law enforcement agencies to deputize individuals or private organizations to pursue civil rights violations and also highlighting creative approaches to advancing important societal concerns about civil rights through the courts). There is no indication that the courts “will have to beg for work, especially in the employment area” as “the EEOC, as well as private parties (ordinarily through class actions), will, presumably, continue to bring lawsuits challenging a ‘pattern and practice’ of illegal conduct.” Berger, *supra* note 17, at 538.

20. *See* Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 451-52 (2004) (describing “a troublesome ‘anti-plaintiff effect’ in federal appellate courts” for employment discrimination claimants along with a bias against plaintiffs at the trial level) (original emphasis); Kevin M. Clermont et al., *How Employment Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP. RTS. & EMP. POL’Y J. 547 (2003); Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ From Negotiable Instruments*, 2002 U. ILL. L. REV. 947; THEODORE EISENBERG &

discrimination claims represented “nearly 10 percent of federal civil cases.”²¹ By 2002, “discrimination complaints filed by workers against private employers jumped more than 4 percent . . . to the highest level since 1995.”²² Although “most employment discrimination cases settle” without a court resolution,²³ the truth remains that when employment discrimination plaintiffs do go to trial they “win less often than other plaintiffs” and they prevail on their claims at “only half the rate of other plaintiffs.”²⁴ Furthermore, “employment discrimination plaintiffs have won 4.23 percent of their pretrial adjudications, while other plaintiffs won 22.23 percent of their pretrial adjudications.”²⁵

On appeals of final federal court employment discrimination decisions, both pretrial adjudications and trials on the merits, “the clear fact is that the defendants’ reversal rate far exceeds the plaintiffs’ reversal rate.”²⁶ There does not appear to be a good explanation for why the review of employment discrimination claims leads “appellate courts [to] reverse plaintiffs’ wins below far more often than defendants’ wins” with defendants winning reversals on appeal versus plaintiffs winning reversal on appeal “at the pretrial stage (54 percent to 11 percent)” and “at the trial stage (42 percent to 8 percent).”²⁷ However, some commentators have concluded that with “defendants succeeding more than plaintiffs on appeal, and much more so in employment discrimination cases,” judges at both the trial and appellate level must maintain a general hostility towards employment discrimination claims.²⁸

STEWART J. SCHWAB, EMPIRICAL STUDY SUGGESTS BIAS IN U.S. APPELLATE COURTS: DOUBLE STANDARD ON APPEAL: AN EMPIRICAL ANALYSIS OF EMPLOYMENT DISCRIMINATION CASES IN THE U.S. COURTS OF APPEALS 1 (2001) (describing an empirical study conducted at the request of two plaintiffs’ employment discrimination firms and finding that “[e]mployment discrimination plaintiffs are far more likely than defendants to be reversed on appeal” because “only 5.8 percent [of defendants’] judgments are reversed” when “43.61 percent of [plaintiffs’] judgments are reversed”), available at <http://www.findjustice.com/pdf/double-standard.PDF>; see also Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 560-61 (2001) (asserting that employers prevail in 98% of federal court employment discrimination cases resolved at the pretrial stage).

21. Clermont & Schwab, *supra* note 20, at 432.

22. *Job Bias Complaints Climb to 7-Year High*, CHI. TRIB., Feb. 7, 2003, at C5 (current EEOC Chairwoman Cari M. Dominguez stated that a “poor economy, an aging and multinational work force and backlash from the 2001 terrorist attacks likely contributed to the increase” and “[a]llegations of race and gender discrimination accounted for a majority of the complaints, at 35 percent and 30 percent, respectively”).

23. Clermont & Schwab, *supra* note 20, at 440 (describing how “almost 70 percent of employment discrimination and other cases are terminated by settlement”).

24. *Id.* at 441.

25. *Id.* at 444.

26. *Id.* at 449 (citing Clermont & Eisenberg, *supra* note 20, at 957-59).

27. *Id.* at 450.

28. *Id.* at 451.

Because of the poor results for employment discrimination claimants in the court system, one commentator has lamented that "employment discrimination cases are notoriously difficult-not easy-to win."²⁹ Another commentator has suggested that "the difficulty in resolving [employment discrimination claims] is due to a series of factors that tend to span across international borders, despite cultural and legal differences among various societies."³⁰ Even plaintiffs' "lawyers admit it's tough to beat employers in discrimination cases."³¹

Despite many positive changes that have occurred as a result of Title VII's enactment more than forty years ago,³² the current results from the court system offer little promise for most employment discrimination claimants. Accordingly, many advocates for ADR have asserted that the use of informal alternatives to the court system, such as arbitration, may provide employment discrimination claimants a more realistic chance for a fair resolution to their disputes.³³

29. Selmi, *supra* note 20, at 556.

30. See Jean R. Sternlight, *In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis*, 78 TUL. L. REV. 1401, 1468 (2004). Professor Jean Sternlight has suggested that the following ten factors make individual employment discrimination claims difficult to resolve: complex laws; highly contested and confusing facts; involvement of significant non-legal as well as legal interests; societal need for correct determinations; societal need for clear and public precedents to guide future conduct and deter future misconduct; the need for adequate compensation of victims of discrimination; the societal need to punish wrongdoers; unavailability of a fair procedural mechanism to assert claims; the need for quick resolution of claims to allow parties to move forward with their lives and business; and alleged victims tend to have less resources than the alleged perpetrators. *Id.* at 1468-82.

31. See Susan Mandel, *Equal Treatment? Study Shows a Wide Gap Between Worker, Employer Wins in Job Bias Appeals*, A.B.A. J., Nov. 2001, at 24; see also Selmi, *supra* note 20, at 560-61 (asserting that employers prevail in 98% of federal court employment discrimination cases resolved at the pre-trial stage); Michael J. Zimmer, *Slicing & Dicing Individual Disparate Treatment Law*, 61 LA. L. REV. 577, 585 (2001) (reviewing Title VII summary judgment analysis and criticizing the courts for slicing and dicing away all of the plaintiff's evidence as part of a process that allows the employer to prevail); see also Johnnie L. Cochran, Jr. & Cyrus Mehri, *Empirical Study Suggests Bias in U.S. Appellate Courts: Joint Statement of Johnnie L. Cochran, Jr. and Cyrus Mehri* (stating the fact that the employment discrimination "defendant has an incredible 43% chance of reversing the plaintiff's victory . . . is particularly troubling when one considers that these are cases in which plaintiffs typically have already overcome difficult summary judgment motions, prevailed at trial, and survived post-trial motions."), available at <http://www.findjustice.com/civil-just/joint-statement.htm>. (last visited Oct. 15, 2005).

32. Many point to the increase in the number of black members of the middle-class as being indicative of the positive outcomes from Title VII. See Ronald Turner, *Thirty Years of Title VII's Regulatory Regime: Rights, Theories, and Realities*, 46 ALA. L. REV. 375, 472-74 & nn.481-90 (1995). However, continuing differences in wealth and income between blacks and whites indicate there is still much more room for improvement. See Michael Z. Green, *Finding Lawyers for Employees in Discrimination Disputes as a Critical Prescription for Unions to Embrace Racial Justice*, 7 U. PA. J. LAB. & EMP. L. 55, 96 & n.188 (2004) (stating that "[a] recent report by the National Urban League indicated that the mean income of black males is seventy percent the mean income of white males, with a \$16,876 gap").

33. See, e.g., Roberto L. Corrada, *Claiming Private Law for the Left: Exploring Gilmer's Impact and Legacy*, 73 DENV. U. L. REV. 1051, 1069 (1996); Charles B. Craver, *The Use of Non-Judicial*

Despite the difficulties for employees and the corresponding positive results for employers in the courts, many employers rushed to use arbitration out of a fear of juries,³⁴ which became available with amendments to Title VII in 1991.³⁵ “[T]he American Arbitration Association (AAA) has claimed that between 1997 and 2002, the number of employees covered by AAA employment arbitration plans grew from 3 million to 6 million.”³⁶ However, many commentators immediately criticized employers’ use of arbitration as an unfair and coercive attempt to circumvent their obligations under Title VII because they used adhesion agreements to require their employees agree as a condition of employment to arbitrate any future disputes that may arise, sometimes referred to as mandatory arbitration.³⁷

Procedures to Resolve Employment Discrimination Claims, 11 KAN. J.L. & PUB. POL’Y 141, 158 (2001); Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563 (2001) [hereinafter, Estreicher, *Saturns*]; Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344, 1349 (1997); Lewis Maltby, *Employment Arbitration and Workplace Justice*, 38 U.S.F. L. REV. 105, 106-07 (2003); Lewis Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 57 (1998); Lewis Maltby, *Paradise Lost—How the Gilmer Court Lost The Opportunity For Alternative Dispute Resolution To Improve Civil Rights*, 12 N.Y.L. SCH. J. HUM. RTS. 1 (1994); David Sherwyn et al., *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing Out the Bathwater, and Constructing A New Sink*, 2 U. PA. J. LAB. & EMP. L. 73, 99-100 (1999); Theodore J. St. Antoine, *Gilmer in the Collective Bargaining Context*, 16 OHIO ST. J. ON DISP. RESOL. 491, 499 (2001); Theodore J. St. Antoine, *Mandatory Arbitration of Employee Discrimination Claims: Unmitigated Evil or Blessing in Disguise?*, 15 T.M. COOLEY L. REV. 1, 1-9 (1998).

34. See *ADR Vision Roundtable: Challenges for the 21st Century*, DISP. RESOL. J., Oct. 2001, at 8, 10 (quoting Samuel Estreicher in explaining that the growth in the use of ADR in employment disputes since 1991 was “in part a response to the initiation of jury trials [in] the discrimination area” at that time and “the desire [of employers] to be free of the unpredictability of jury awards”); E. Patrick McDermott & Ruth Obar, *Workplace Dispute Resolution After Circuit City: A Complainant’s Perspective on Employer Dispute Resolution Programs Requiring Mandatory Arbitration*, 48 WAYNE L. REV. 1157, 1162 (2002) (asserting that “[i]njuries are generally considered to be more pro-plaintiff/anti-employer than federal judges are” and how the passage of the Civil Rights Act of 1991 allowing jury trials and the right to compensatory and punitive damages for employment discrimination along with the growth of other employment laws has “caused more employers to consider the use of ADR to avoid adjudication of such disputes in the courtroom”).

35. See Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 101-102, 105 Stat. 1071-74 (1991) (codified in pertinent part at 42 U.S.C. § 1981a (2004)) (granting the right to compensatory and punitive damage remedies and the right to a jury trial to claimants filing claims of intentional discrimination under Title VII while placing caps on recovery of \$50,000 for employers with less than 101 employees and gradual monetary increases corresponding to the increasing number of employees in the workforce up to a maximum of \$500,000 for employers with more than 500 employees).

36. See Thomas J. Stipanowich, *ADR and the “Vanishing Trial”: The Growth and Impact of “Alternative Dispute Resolution”*, 1 J. OF EMPIRICAL LEGAL STUD. 843, 900 (2004).

37. See generally Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?* 57 STAN. L. REV. 1631 (2005) (describing the growth and criticism of mandatory arbitration agreements). Although there are likely scores of other articles discussing the subject of mandatory arbitration in employment, I have found the following articles of value in understanding this criticism. See Reginald Alleyne, *Statutory Discrimination Claims: Rights “Waived” and Lost in the Arbitration Forum*, 13 HOFSTRA LAB. L.J. 381 (1996); Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of*

Although arbitration became the initial focus, and there are still some issues to be addressed about its fairness, employers have started to recognize some of the concerns about mandatory arbitration. Their enthusiasm for this form of ADR in handling employment disputes may be waning.³⁸ As a response to the backlash against arbitration, mediation has started to replace arbitration.³⁹ In the employment setting, mediation is now

Statistics in Judicial Review of Employment Arbitration Awards, 29 MCGEORGE L. REV. 223 (1998); Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331 (1997); Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449 (1996); Christine Godsil Cooper, *Where Are We Going With Gilmer?—Some Ruminations On the Arbitration of Discrimination Claims*, 11 ST. LOUIS U. PUB. L. REV. 203 (1992); Joseph R. Grodin, *On The Interface Between Labor And Employment Law*, 19 BERKELEY J. EMP. & LAB. L. 307, 310–11 (1998); Karen Halverson, *Arbitration and The Civil Rights Act of 1991*, 67 U. CIN. L. REV. 445 (1999); Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395 (1999); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33; Eileen Silverstein, *From Statute to Contract: The Law of the Employment Relationship Reconsidered*, 18 HOFSTRA LAB. & EMP. L.J. 479 (2001); Jean R. Sternlight, *Panacea Or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U.L. Q. 637 (1996); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990's*, 73 DENV. U. L. REV. 1017 (1996). However, others have argued that standard form adhesion agreements add value to a company and save costs that benefit employees. See Christopher R. Drahozal, *Nonmutual Agreements to Arbitrate*, 27 J. CORP. L. 537, 555–61 (2002) (arguing that standard form adhesion agreements to arbitrate save costs and provide fair options and being forced to not use these agreement will add to the costs and make the agreements unfair for employees); Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 771–72 (asserting there are sound business reasons for standard form adhesion agreements to arbitrate so that they are not necessarily unfair); Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 91–93 (asserting that adhesion agreements to arbitrate are fair in that they allow companies to pass on savings in costs from standard forms to their customers and employees). But see Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach To Mandatory Consumer and Employment Arbitration to that of the Rest of the World*, 56 U. MIAMI L. REV. 831, 840 n.65 (2002) (asserting that any cost savings resulting from standard form arbitration clauses do not get passed back to employees because "absent perfect competition, companies will be able to keep any profits they secure by imposing binding arbitration").

38. See Simon J. Nadel, *Mandatory Arbitration Not for All Employers; Cost, Fairness Still Subject of Debate*, 70 U.S.L.W. 2755, 2756 (June 4, 2002) (describing comments of management counsel and a member of the Human Resources think tank Employment Roundtable, Stuart Brody, about how mandatory arbitration agreements are "counterproductive" to creating a high-performance workplace and increasing retention rates" and "they will end up costing employers in terms of turnover, morale, and worker performance" because "this is not the way you get productivity out of people").

39. See Robert A. Baruch Bush, *Substituting Mediation for Arbitration: The Growing Market for Evaluative Mediation, and What It Means for the ADR Field*, 3 PEPP. DISP. RESOL. L.J. 111 (2002) (describing how mediation is replacing arbitration as a preferred dispute resolution option); John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. NEGOT. L. REV. 137 (2000) (referring to empirical study from questionnaire given to outside counsel, in-house counsel, and corporate executives demonstrating that all three groups think favorably of using mediation to resolve business disputes); Stephen N. Subrin, *A Traditionalist Looks at Mediation: It's Here to Stay and Much Better Than I Thought*, 3 NEV. L.J. 196 (2003) (arguing for the use of mediation as a supplement to litigation); Richard C. Reuben, *The Lawyer Turns Peacemaker: With Mediation Emerging as the Most Popular Form of Alternative Dispute Resolution, the Quest for Common Ground Could Force Attorneys to Reinterpret Everything They Do in the Future*, A.B.A. J., Aug. 1996, at 55

growing and also becoming the preferred method by all stakeholders, employers, employees and their lawyers, for resolving disputes involving employment matters.⁴⁰ Similarly, several commentators, including me, have also promoted the use of mediation in certain employment discrimination situations.⁴¹ At the same time, mediation of employment disputes has started to grow outside the United States, too.⁴²

(describing an ABA poll of lawyers that "confirms a preference for mediation over litigation and arbitration as the dispute resolution method of choice, which is consistent with other signs mediation is gaining ground"). But see Deborah Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 85 (arguing that the premise under which parties with legal claims prefer to resolve their "claims through mediation rather than adversarial litigation and adjudication seems to be based on questionable assumptions and debatable extrapolations from other social conflict contexts").

40. See Jeff Kichaven & Deborah Rothman, *Lawyers Speak Out on Justifying Court Mediation to Their Clients*, 21 ALTERNATIVES TO HIGH COSTS OF LITIG. 149, 166 (2003) (describing how "mediation has become so thoroughly accepted by the employment bar" and identifying comments from both plaintiffs' and defendants' counsel supporting the use of mediation in employment disputes); Stipanowich, *supra* note 36, at 886 n.175 (describing a 2002 survey of 43 Fortune 1000 companies and finding that "mediation was the most frequently preferred approach in employment . . . disputes"); Arup Varma & Lamont E. Stallworth, *Participants' Satisfaction With EEO Mediation and the Issue of Legal Representation: An Empirical Inquiry*, 6 EMP. RTS. & EMP. POL'Y J. 387, 392 (2002) (highlighting the growing preference for using mediation in resolving employment discrimination claims); see also Berger, *supra* note 17 (advocating the benefits of using mediation for employment discrimination disputes with some concerns); Bruce A. Coane & Ross W. Wooten, *Successful Strategies in Mediating Employment Cases*, 23 WM. MITCHELL L. REV. 901 (1997) (highlighting strategies and benefits of using mediation in employment disputes from the plaintiff's perspective); Craver, *supra* note 33, at 145-50 (describing potential benefits of mediating employment discrimination charges); Cindy Cole Ettingoff & Gregory Powell, *Use of Alternative Dispute Resolution in Employment-Related Disputes*, 26 U. MEM. L. REV. 1131 (1996) (asserting the benefits of using ADR including mediation for employment disputes); Ann C. Hodges, *Mediation and the Transformation of American Labor Unions*, 69 MO. L. REV. 365 (2004) (asserting the value of using mediation in employment disputes in union and non-union workplaces); Homer LaRue, *The Changing Workplace Environment in the New Millennium: ADR is a Dominant Trend in the Workplace*, 2000 COLUM. BUS. L. REV. 453 (2000) (touting the use of ADR including mediation as a tool to handle workplace disputes); Michael J. Yelnosky, *Title VII, Mediation, and Collective Action*, 1999 U. ILL. L. REV. 583 (suggesting the value of mediating Title VII claims and the use of employee caucuses to assist individual employees in the process).

41. See Mijha Butcher, *Using Mediation to Remedy Civil Rights Violations When The Defendant is Not an Intentional Perpetrator: The Problems of Unconscious Disparate Treatment and Unjustified Disparate Impacts*, 24 HAMLINE J. PUB. L. & POL'Y 225 (2003) (describing the value of agreements reached through transformative mediation of employment discrimination claims); Aimee Gourlay & Jenelle Soderquist, *Mediation in Employment Cases is Too Little Too Late: An Organizational Conflict Management Perspective on Resolving Disputes*, 21 HAMLINE L. REV. 261 (1998) (advocating the use of mediation but suggesting that it should be part of an overall conflict resolution system developed as early as possible); Michael Z. Green, *Proposing a New Paradigm for EEOC Enforcement After 35 Years: Outsourcing Charge Processing by Mandatory Mediation*, 105 DICK. L. REV. 305 (2001) (asserting that mediation of employment discrimination charges filed with the EEOC should be mandatory to reap the benefits of more participation by parties and in reducing the EEOC's backlog); Jonathan R. Harkavy, *Privatizing Workplace Justice: The Advent of Mediation in Resolving Sexual Harassment Disputes*, 34 WAKE FOREST L. REV. 135 (1999) (suggesting the value of mediating sexual harassment claims); Ann C. Hodges, *Mediation and the Americans with Disabilities Act*, 30 GA. L. REV. 431 (1996) (describing the value of mediating disability discrimination claims); Lamont Stallworth et al., *Discrimination in the Workplace: How Mediation Can Help*, DISP. RESOL. J., Feb.-Apr. 2001, at 35 (suggesting that employers and federal legislation can help resolve employment discrimination disputes by encouraging the use of mediation); Carrie A. Bond, Note, *Shattering the Myth: Mediating Sexual*

Likewise, the Equal Employment Opportunity Commission (EEOC), the agency charged with enforcing Title VII, has enthusiastically endorsed the use of mediation to resolve employment discrimination charges filed with the EEOC.⁴³ Mediation represents a very satisfactory mechanism for resolving employment discrimination disputes according to the parties involved in charges filed with the EEOC. In a 2000 report, *An Evaluation of the EEOC Mediation Program*,⁴⁴ participants in the EEOC mediation program expressed a high degree of satisfaction with the process.⁴⁵ The report also stated that “nine out of 10 participants (96% of employers and 91% of charging parties) indicated that they would be willing to participate in EEOC’s mediation program again . . . [r]egardless of the outcome of their mediation.”⁴⁶

After the initial expansion of arbitration into employment discrimination claims in the early 1990s, mediation has now clearly become a key ADR tool in resolving Title VII claims. As one travels along the road to mediation of employment discrimination claims, new issues are starting to arise because this process involves the privatization of a public dispute resolution system created by Congress to effectuate the goals of Title VII. Although individual employers and employees may continue to draw upon the benefits of a system that allows them to circumvent the dangers of the court system, broader questions about the abilities of the mediation process

Harassment Disputes in the Workplace, 65 FORDHAM L. REV. 2489 (1997) (advocating the use of mediation in sexual harassment disputes). But see Matt A. Mayer, *The Use of Mediation in Employment Discrimination Cases*, 1999 J. DISP. RESOL. 153 (asserting the public value of court litigation and questioning the use of mediation as a tool to resolve employment discrimination disputes).

42. See Cheryl L. Dolder, *The Contribution of Mediation to Workplace Justice*, 33 INDUS. L.J. 320, 330-31 (2004) (describing the increasing use of mediation for workplace disputes in England); Sternlight, *supra* note 30, at 1449-50 (describing same).

43. See Robert E. Talbot, *A Practical Guide to Representing Parties in EEOC Mediations*, 37 U.S.F.L. REV. 627, 628-30 (2003) (lauding the EEOC’s mediation program); Butcher, *supra* note 41, at 257-58 (describing the EEOC’s mediation program); Julie Harders, *Too Good To Last? Budget Cuts Force the EEOC to Terminate Contract Mediators From its New, Highly Touted Program*, A.B.A. J., Apr. 2000, at 30; *EEOC’s Mediation Program Going Strong Despite Budget Shortfall*, *Coordinators Say*, Daily Lab. Rep. (BNA) No. 59, at B-1 (Mar. 27, 2000); Stallworth et al., *supra* note 41, at 83-84; see also Matthew A. Swendiman, Note, *The EEOC Mediation Program: Panacea or Panicked Reaction?*, 16 OHIO ST. J. ON DISP. RESOL. 391 (2000) (describing benefits of the EEOC mediation program).

44. U.S. EQUAL EMP. OPPORTUNITY COMM’N, *AN EVALUATION OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION MEDIATION PROGRAM 1* (2000), <http://www.eeoc.gov/mediate/report/index.html>. For a full description of the research methodology used, see chapter five of the report, <http://www.eeoc.gov/mediate/report/chapter5.html>.

45. See Press Release, U.S. EQUAL EMP. OPPORTUNITY COMM’N, *EEOC Mediation Program Scores High Marks in Major Survey of Participants* (Sep. 26, 2000), *available at* <http://www.eeoc.gov/press/9-26-00.html>.

46. *Id.*; see also Berger, *supra* note 17, at 512 (finding that in employment mediation “many participants express contentment with the process—sometimes even without obtaining money or other tangible rewards”).

to provide societal justice are starting to percolate with a focus on what the mediator can and should do to make sure that mediation agreements somehow comply with legal norms that would apply in the public court system.

Many critics have bemoaned the decreasing use of the public court system as a tool for justice due to the increasing use of ADR.⁴⁷ Bryant Garth has provided an interesting critique of ADR by asserting that our legal justice system has evolved into a merged private and public system for the "elite that have a full array of alternatives, including the federal courts, which they can use for tactical and other reasons" while we have "created a low-end justice for the rank and file."⁴⁸ All of this is happening at a time when commentators are debating about the concern that jury trials may be headed to a vanishing point.⁴⁹

III.

EMPLOYMENT DISCRIMINATION MEDIATION EXAMINED UNDER THE LENS OF SOCIAL JUSTICE: EXPECTING A TRANSFORMATIVE PIPEDREAM WHILE TILTING AT NEUTRALITY WINDMILLS

The growth of ADR from its initial focus on arbitration to its currently strong preference for mediation makes sense for employment claims given

47. See, e.g., Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WISC. L. REV. 1359; Delgado, *supra* note 1; Delgado, *Conflict as Pathology*, *supra* note 8; Delgado, *supra* note 10; Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) (analyzing adjudication in terms of public values that are threatened by settlement and ADR processes); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991) (criticizing the use of mediation in domestic relations disputes instead of the court system); Leo Kanowitz, *Alternative Dispute Resolution and the Public Interest: The Arbitration Experience*, 38 HASTINGS L.J. 239 (1987) (asserting that certain public interests must be protected when implementing private ADR programs); Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1 (1993) (criticizing the focus on informal resolutions for seeking harmony rather than being concerned about justice); Ralph Nader, *The Corporate Drive to Restrict Their Victims Rights*, 22 GONZ. L. REV. 15, 20-21 & n.211 (1987) (describing the value of litigation options, including the jury system, as a deterrent to further wrongdoing and as a public communication vehicle to expose a wrongdoer); Judith Resnik, *Many Doors? Closing Doors?: Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211 (1995) (lamenting the continued decrease in court resolution of disputes). See generally Stempel, *Fuzziness*, *supra* note 16 (describing recent analysis of trends in dispute resolution and highlighting the critiques of "litigation romanticists" and contrasting those views with those who still see the value of ADR).

48. Bryant Garth, *Tilting The Justice System: From ADR as Idealistic Movement to a Segmented Market in Dispute Resolution*, 18 GA. ST. U. L. REV. 927, 932 (2002).

49. See Hope Viner Samborn, *The Vanishing Trial: More and More Cases are Settled, Mediated or Arbitrated Without a Public Resolution. Will the Trend Harm the Justice System?*, A.B.A. J., Oct. 2002, at 24. Marc Galanter has completed a study of the vanishing trial and suggested implications. Marc S. Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. OF EMPIRICAL LEGAL STUD. 459 (2004).

the high levels of stakeholder satisfaction. But satisfaction results may not represent societal justice, especially when an employee lacks legal representation and bargaining power.⁵⁰ Nevertheless, when employers and employees can find common ground to craft their own resolution in mediation, it offers some degree of privacy and certainty that might be more important to the parties than the delivery of a just result based upon societal standards or legal norms. Because of a focus on the needs of the parties in private mediation rather than society's need to eradicate workplace discrimination, concerns about justice in mediation have become an issue along with the power of the mediator to control the parties.

To the extent there is a concern about the need for justice in mediation, no universal agreement has arisen as to what the definition of justice in mediation should encompass.⁵¹ Because it depends on the private agreement of the parties,⁵² by its nature, mediation will only address private norms and default positions under contract law rather than the norms to be enforced by broader societal concepts of justice and public policy.⁵³ Jonathan Hyman and Lela Love recently explored the full gamut of possible issues of justice in mediation. Without coming up with a single definition, they explored several possibilities for justice that may be meted out through mediation, including reparative justice, distributive justice, transformative justice, and procedural justice, to name a few.⁵⁴ According to Hyman and Love, the goals of justice in mediation come from the parties and not from the law.⁵⁵ They posit that the mediator's role regarding justice arises when the "parties seek to satisfy their sense of fairness and justice."⁵⁶ At that point, the mediator should try to "understand the [justice] claim with the same kind of empathetic response that she brings to each party's feelings and interests."⁵⁷ Then, without needing to agree with a party's assessment

50. See Delgado, *Conflict as Pathology*, *supra* note 8, at 1395-96 (describing how satisfied users may mask bargaining power differentials); Donald T. Weckstein, *In Praise of Party Empowerment—And of Mediator Activism*, 33 WILLAMETTE L. REV. 501, 538-39 (1997) (describing the needs of participants in mediation for more information when there are bargaining power differentials or lack of legal representation).

51. Jonathan M. Hyman & Lela P. Love, *If Portia Were a Mediator: An Inquiry into Justice in Mediation*, 9 CLINICAL L. REV. 157, 162-74 (2002) (describing various forms of justice that may be arguably achieved through mediation including reparative justice, distributive justice, transformative justice, and procedural justice).

52. See Scott Peppet, *Contractarian Economics and Mediation Ethics: The Case for Customizing Neutrality Through Contingent Fee Mediation*, 82 TEX. L. REV. 227, 230-31 (2003) (asserting that "in private mediations, the parties create the mediator's role by agreement").

53. *Id.* at 231 n.10, 234 (describing how agreements to mediate can define the role and duties of the mediator and how such contracts operate under default rules that the parties can alter under general contract law principles).

54. Hyman & Love, *supra* note 51, at 162-74.

55. *Id.* at 161 n.5.

56. *Id.* at 165.

57. *Id.*

of justice, the mediator should "be able to articulate the meaning of justice as the party sees it, and help the party think through his ideas in ways that might lead to a resolution."⁵⁸

*A. Concerns About Mediators Pushing Their Own Views
of Justice in Mediation*

Based on his experience in representing clients in employment discrimination mediation and other admitted "biases," James Coben has recently expressed great concern about the acts of mediators, leading him "to take a dark view of the quality of justice delivered in mediation."⁵⁹ His concerns result from experiences with mediators who "incorrectly evaluate . . . clients' cases, and their strong push for particular settlement structures while simultaneously proclaiming process neutrality."⁶⁰ These concerns can be ameliorated if the focus of the mediator becomes limited to merely what the parties need and want rather than what the mediator wants. At first blush, this may appear to be an overly simplistic suggestion. However, recognizing the significance of mediator approach and orientation along with the ability of the mediator to influence the parties by losing focus has not garnered enough attention of commentators. Accordingly, any efforts to use mediation in resolving Title VII claims must recognize the importance of power differentials, cultural dynamics, and other societal concerns involved with the resolution of a claim brought under a federal statute banning employment discrimination. Mediators must be careful so that they do not abuse their power under the guise of delivering justice and turn mediation into another tool for the powerful or the haves to destroy the rights of the powerless or have-nots in our society.⁶¹

58. *Id.*

59. James R. Coben, *Gollum, Meet Smeagol: A Schizophrenic Rumination on Mediator Values Beyond Self-Determination and Neutrality*, 5 CARDOZO J. CONFLICT RESOL. 65, 66 (2004).

60. *Id.* at 65.

61. In the early 1980s, many law and society commentators criticized ADR and lamented that it was being offered as a form of informal second-class justice merely for the have-nots in our society. See Susan M. Olson and Albert W. Dzur, *Revisiting Informal Justice: Restorative Justice and Democratic Professionalism*, 38 LAW & SOC'Y REV. 139, 141 (2004) (citing works by RICHARD L. ABEL, *The Contradictions of Informal Justice*, in THE POLITICS OF INFORMAL JUSTICE, VOL. 1: THE AMERICAN EXPERIENCE (Richard Abel ed., 1982); Roman Tomasic, *Mediation as an Alternative to Adjudication: Rhetoric and Reality in the Neighborhood Justice Movement*, in NEIGHBORHOOD JUSTICE: ASSESSMENT OF AN EMERGING IDEA (Roman Tomasic & Malcolm Feeley eds., 1982); Sally Engle Merry, *Defining Success in the Neighborhood Justice Movement*, in NEIGHBORHOOD JUSTICE: ASSESSMENT OF AN EMERGING IDEA, *supra*; Sally Engle Merry, *Myth and Practice in the Mediation Process*, in MEDIATION AND CRIMINAL JUSTICE: VICTIMS, OFFENDERS AND COMMUNITY (M. Wright & B. Galaway, eds., 1989); Richard Hofrichter, *Justice Centers Raise Basic Questions*, in NEIGHBORHOOD JUSTICE: ASSESSMENT OF AN EMERGING IDEA, *supra*; Richard Hofrichter, *Neighborhood Justice and the Social Control Problems of American Capitalism: A Perspective*, in THE POLITICS OF INFORMAL JUSTICE, VOL. 1: THE AMERICAN EXPERIENCE, *supra*; CHRISTINE B. HARRINGTON, *Shadow Justice: The Ideology and Institutionalization of Alternatives to Court* (1985); and Delgado et al., *supra* note 47).

Proponents for mediation should not get caught up in the wave of enthusiasm and bliss surrounding ADR⁶² and start rushing to suggest that mediators should deliver social justice in accord with the goal of Title VII to eradicate workplace discrimination. By "social justice," I am referring to both "distributive and relational" attributes along with procedural aspects.⁶³ Mediation, by its nature, represents a creature of contract and the mediator should only focus on accomplishing what the parties want not what the mediator wants.⁶⁴ But there is nothing to stop mediators from using their power solely for their own interests and not the interests of the parties. Because of that potential for abuse of power, a mediator should determine what the expectations of the parties are in each individual situation and act accordingly in helping them resolve their conflict based upon that determination.⁶⁵

The concern about the have-nots in our legal system has been addressed by Marc Galanter. See generally Galanter, *supra* note 5. For a more recent discussion and application of this matter to ADR, see Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19 (1999).

62. See Stempel, *Fuzziness*, *supra* note 16, at 309 (noting how "much ADR scholarship has been fluffy, overly romantic about ADR, or vague in its observations and prescriptions" and arguing that "[m]uch too much ADR scholarship has the tone of cultist conversion, religious fervor, or infatuation with all that is not litigation" especially given that "much of the literature of mediation and ADR is almost Pollyannaish in its unalloyed optimism-cum-boosterism").

63. See John O. Calmore, "Chasing the Wind": Pursuing Social Justice, Overcoming Legal Mis-Education, and Engaging in Professional Resocialization, 37 LOY. L.A. L. REV. 1167, 1176 n.30 (2004) (defining social justice "to embrace both fairness and equity in the distribution of a wide range of attributes, which need not be confined to material things" (quoting DAVID SMITH, GEOGRAPHY AND SOCIAL JUSTICE 26 (1994)). Under this definition of justice, there is a "primary focus . . . on attributes which have an immediate bearing on people's lives," so that "our conception of social justice goes beyond patterns of distribution, general and spatial, to incorporate attributes relevant to how these come about" and it also focuses on concerns about both "fairness . . . applied to procedures and justice to outcomes." *Id.*

64. See Weckstein, *supra* note 50, at 506-07 & nn.15-16 (referring to norm-generating mediators who "avoid explicit consideration of social norms, thus vesting the parties with maximum discretion to resolve their dispute with or without reference to any standards beyond their personal preferences" or to norm-educating mediators who try "to assure that disputants are aware of information concerning applicable law and other relevant data" but "may differ in the proper method of communicating this information to the parties" because they may "suggest that each party consult appropriate legal or expert counsel" or "with concurrence of the parties" they get approval to bring in a "third-party . . . expert to educate the disputants" (citing Ellen Waldman, *The Challenge of Certification: How to Ensure Mediator Competence While Preserving Diversity*, 30 U.S.F.L. REV. 723, 733-34 (1996))).

65. See Sternlight, *supra* note 17, at 297 (criticizing those "who opine on dispute resolution issues [as] hav[ing] a tendency to say that they or we know what disputants really want, when in fact the evidence is quite sparse" so the arguments that parties want an adversary process or that they feel "trials are terrible" or that they want a "conciliated, non-legal solution to a trial" are all merely unsubstantiated assumptions). Professor Sternlight suggests that we need research to find out what parties want and asserts that research "will ultimately show that disputants are generally looking for three benefits from a dispute resolution system: (1) a system that provides them with a substantively fair/just result; (2) a system that meets the procedural justice criteria of voice, participation, and dignity as set out above; and (3) a system that helps them to achieve other personal and emotional goals, such as reconciliation, or that at least does not leave them feeling worse, emotionally and psychologically." *Id.* at 299.

Some believe that a mediator can help the parties transform their relationship as a form of therapeutic jurisprudence or justice.⁶⁶ However, this assumption that mediation can transform the parties' relationship represents too much about what the mediator wants and assumes without knowing that this is what the parties want.⁶⁷ A mediator should not come in with a predetermined expectation of providing social justice or of transforming the parties' relationship or of knowing how a particular type of dispute can be best resolved.⁶⁸ Lofty goals of transforming the parties' relationships are certainly legitimate bargaining chips for parties in mediation, but they should only be pursued by the mediator after determining that those goals represent the parties' goals in achieving some resolution to their conflict.⁶⁹ Otherwise, the mediator can stray from party self-determination and become too enthralled with what the mediator thinks is best for the parties even when that is not what the parties want.

66. See Ellen A. Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 HASTINGS L.J. 703 (1997); Waldman, *supra* note 15; see also Reuben, *supra* note 39, at 59 (describing this "therapeutic approach"). As part of the transformative mediation bandwagon, the U.S. Postal Service has adopted this form of mediation. See James R. Antes et al., *Transforming Conflict Interactions in the Workplace: Documented Effects of the USPS REDRESS® Program*, 18 HOFSTRA LAB. & EMP. L.J. 429 (2001) (describing the USPS transformative mediation program for handling employment disputes); Lisa B. Bingham et al., *Exploring the Role of Representation in Employment Mediation at the USPS*, 17 OHIO ST. J. ON DISP. RESOL. 341, 356 & n.89 (2002) (noting the Postal Service's choice of transformative mediation and defining it as involving "a unique potential for transforming people—engendering moral growth—by helping them wrestle with difficult circumstances and bridge human differences, in the very midst of conflict" (citing ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* 2 (1994), which first articulated the transformative mediation approach)); Cynthia Hallberlin, *Transforming Workplace Culture Through Mediation: Lessons Learned from Swimming Upstream*, 18 HOFSTRA LAB. & EMP. L.J. 375 (2001).

67. I believe that those who purport to call themselves transformative mediators have become too excited about the press clippings, alleged mysticism, and their own hyperbole regarding transformative mediation. Therefore, I agree with Stephen Subrin, who recently stated his doubts about mediators being able to operate under and deliver on promises to transform parties:

I am quite sure that if transformative mediators told clients and lawyers engaged in litigation that the purpose of the mediation, for which the clients were to pay, was to empower the clients and make them recognize the humanity of their opposing side, they would lose a good deal of business. The idea that empowerment and recognition is why most folks want to enter into mediation does not ring true. . . . Moreover, the likelihood that most human beings will substantially change, be transformed, by some hours of mediation is most unlikely. Talk to analysts or other mental health professionals. Think about how easy it is to alter your own thoughts and behavior.

Subrin, *supra* note 39, at 220 n.119.

68. See Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2694 n.139 (1995) (arguing that it is unlikely that we can assign a particular type of dispute to a particular process before the dispute arises).

69. Subrin, *supra* note 39, at 220 n.119 (asserting that transformative mediators would "lose a good deal of business" if they told their paying clients that their intention was to transform the parties' relationship and "[i]f transformative mediators do not tell their clients what their . . . agenda is . . . it is unfair to those who come to them and pay them").

B. Repeat Players in Mediation as a Justice Concern

If we return to the problem in the prologue of this Article, the difficulty for Walter in finding an attorney represents one issue that should be highlighted. Employers and their counsel are repeat players in having to resolve employment discrimination disputes. Individual employees may only have one shot in their careers at resolving an employment discrimination dispute and this difficulty becomes exacerbated when operating without legal counsel.

Employers, acting as repeat players, have the resources to set norms in the disputing process. Their power in relation to a one-shot disputant presents concerns about the fairness of resolving a dispute in a forum where one party has this repeat player advantage. In Marc Galanter's landmark analysis of legal disputes, he predicted that like kinds (repeat players with repeat players and one-shot disputants with one-shot disputants) would be less likely to use the court system and more likely to employ the benefits of privatized systems because of their somewhat equal resources.⁷⁰ An underlying normative principle in his analysis assumes that the dispute resolution system used can and should provide distributive justice in fairly allocating resources.⁷¹

Galanter's suggested solution to address the disparity in the court system when a party has the repeat player advantage is to provide more mechanisms so that have-nots (one-shot disputants) become more like repeat players by obtaining repeat player resources in the court system.⁷² Although Galanter suggested changes to the formal court system to accomplish his distributive justice goal, he failed to appreciate the influence of politics as these social justice efforts have been rebuffed by the court system and its judges.⁷³

Even while repeat player advantages continue for employers in the court system, employers have opted to use ADR in more situations—a

70. Galanter, *supra* note 5, at 124-26 (referring to what we now call ADR as "Alternatives To The Official System"); *see id.* at 108 (describing how most one-shot versus one-shot disputes are "pseudo-litigation" where the parties have worked out a settlement that is ratified in the guise of adjudication or that it involves fights with overtones of "spite" and "irrationality" and it involves few appeals); *id.* at 144 (finding that private dispute resolution will be preferred when both parties are repeat players).

71. Galanter actually refers to justice possibilities as "redistributive." *Id.* at 95 (asserting that "the basic architecture of the legal system creates and limits the possibilities of using the system as a means of redistributive (that is, systemically equalizing) change"); *id.* at 150 (noting the difficulties with litigation in being "unlikely to shape decisively the distribution of power in society"); Menkel-Meadow, *supra* note 61, at 20 (describing Galanter's approach to finding out whether redistributive justice can be achieved in litigation).

72. Galanter, *supra* note 5, at 135-48 (suggesting reforms including collective actions and broader remedies).

73. Menkel-Meadow, *supra* note 61, at 29-30 (noting that Galanter's analysis failed to appreciate the political factors that would be necessary to make the court system respond to his social and distributive justice goals).

choice that seems to reflect little thought about their repeat player advantage in the courts.⁷⁴ That is, unless the use of ADR presents just another stronger and private system for the employer haves. The real advantage in being the haves represents the ability “to choose and manipulate what process will be used to enforce substantive rights” because “advantages . . . will flow to the repeat player who controls virtually all aspects of the disputing process.”⁷⁵ Recognizing the potential for abuse in a dispute resolution setting dominated by an employer, the issue becomes whether anything can be done to rectify the repeat player advantage in the private dispute resolution setting.⁷⁶

Despite the difficulties presented by repeat player issues, some advocates believe that mediators can help provide justice.⁷⁷ Under the Galanter hypothesis, the fairest dispute resolution system involves parties with similar resources such as repeat players versus repeat players or one-shot disputant versus one-shot disputant. When there is a repeat player resource advantage, the dispute resolution system must undergo certain changes to provide more resources to the one-shotter to level the dispute resolution playing field.⁷⁸ Similar to Galanter’s attempts to make the litigation process provide more repeat player resources for one-shot litigants, the design of the mediation system for employment discrimination matters must allow more repeat player resources for individual one-shot employee participants. This means removing some of the repeat player advantages in legal resources by making sure employees have legal counsel

74. See generally Michael Z. Green, *Debunking the Myth of Employer Advantage From Using Mandatory Arbitration For Discrimination Claims*, 31 RUTGERS L.J. 399, 443-62 (2000) (questioning the increasing use of arbitration by employers for handling employment discrimination claims when they handily win in courts as a disconnect between employers and their counsel over fees).

75. Menkel-Meadow, *supra* note 61, at 26, 34; see also Berger, *supra* note 17, at 533 (noting how employers benefit “from being a ‘repeat player’ in mediation and from its ability to hire superior legal assistance”); Gary LaFree & Christine Rack, *The Effects of Participants’ Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 LAW & SOC’Y REV. 767, 768-69 (1996) (referring to a repeat player effect in mediation).

76. Menkel-Meadow, *supra* note 61, at 37; see also Lauren Edelman & Mark Suchman, *When the “Haves” Hold Court: Speculations on the Organizational Internalization of Law*, 33 LAW & SOC’Y REV. 941, 949-53, 961, 965 (1999) (suggesting that when companies and corporations internalize their disputes they transcend the repeat player problem in the litigation process by becoming “nothing less than the playing field itself” and asserting that despite “the best intentions of individual officials. . . , organizational dispute processing forums are rarely level ground”).

77. See Lela P. Love, *Preface to the Justice in Mediation Symposium*, 5 CARDOZO J. CONFLICT RESOL. 59, 62 (2004) (suggesting the problems with justice and repeat players in mediation); see also Coben, *supra* note 59, at 70 n.25, 77 n.57 (raising the concern about justice in mediation when dealing with repeat players). Professor Love has also asserted that justice must play a role in mediation. Lela P. Love, *Images of Justice*, 1 PEPP. DISP. RESOL. L.J. 29 (2001); Hyman & Love, *supra* note 51, at 159 n.1 (raising the importance of justice in mediation but noting the difficulty of defining what justice in mediation would look like).

78. Galanter, *supra* note 5, at 144.

(who are also repeat players in mediation),⁷⁹ ensuring that employees have fair and balanced selection processes for the mediators, and providing employees the opportunity to select diverse mediators who do not represent repeat player advantages for the employer.⁸⁰ With these concerns in place when considering the design of the mediation system, certain worries, if any, about justice in mediation based on any repeat player problem can be addressed.⁸¹

C. *The Intersection of Private Mediation, Mediator Neutrality/Activism & Justice*

1. *Attempting to Understand Justice in Private Mediation: At a Minimum, the Guarantee of Procedural Safeguards*

What kind of justice should be delivered in mediation remains an academic pursuit rather than a focus on actual disputants' expectations in mediation.⁸² Regardless, even if the dispute resolution system is objectively fair, it will not work when it is perceived as unfair because of procedural justice concerns.⁸³ Professor Nancy Welsh has added a significant

79. Menkel-Meadow, *supra* note 61, at 34 n.71, 37 (identifying disadvantages for "employment claimants" in ADR who are "one shot claimants with one-shot or 'new to the territory' lawyers" and describing how "lawyers themselves who routinely appear in ADR proceedings may be repeat players in all of the ways originally documented by Galanter"). The repeat player lawyer concern has been raised in the employment arbitration context. See Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189, 197-200 (1997) (discussing lawyers as repeat players in employment arbitration and noting that it is very unlikely that even a "less able" plaintiffs' lawyer will become a repeat player lawyer in employment arbitration); Estreicher, *Saturns*, *supra* note 33, at 566 ("[T]he real repeat players in arbitration are not the parties themselves but the lawyers involved.").

80. See Menkel-Meadow, *supra* note 61, at 34 n.71, 35-36 (describing "challenge[s] [to] the bias of presumed repeat player [neutrals] who are thought to represent the repeat player interest of securities brokers or the securities industry or who are too homogeneous demographically and sufficiently representative of claimants"); see also Berger, *supra* note 17, at 533 (describing repeat player problem); but see Menkel-Meadow, *supra* note 61, at 34 n.71 (asserting that "employment claimants" who use a "repeat play plaintiff's lawyer" or "specialized lawyers" with "some knowledge or 'consent' to the use of an ADR provider who is effective" may be an advantage).

81. See Menkel-Meadow, *supra* note 61, at 46 ("issues of fairness and advantage can be dealt with by program or system design" and describing the Brown and Root Company dispute resolution system in which "attempts to minimize repeat player advantage by having costs (of the arbitration, of claimant's lawyer's fees, and of some of the witness fees) paid for by the employer and by utilizing a multitiered program in which employees use internal grievances . . . , nonbinding mediation, or internal conferences, and then finally binding arbitration").

82. See Lisa B. Bingham, *Why Suppose? Let's Find Out: A Public Policy Research Program on Dispute Resolution*, 2002 J. DISP. RESOL. 101, 102 (asserting the need for further research about the impacts of dispute resolution); Hensler, *supra* note 39, at 95 (arguing for more research about the fairness for disputants who use ADR); Sternlight, *supra* note 17, at 297.

83. Sternlight, *supra* note 17, at 297; see also Bingham et al., *supra* note 66, at 345-46 (noting that "organizational decisions will be more readily accepted if the processes by which they are achieved are perceived to be fair" and how "researchers have found that employee satisfaction is more strongly influenced by the perceived fairness of the grievance procedure than by the perceived fairness of the

contribution to the meaning of procedural justice in mediation through her writings.⁸⁴ If the procedures employed during mediation provide participants with an opportunity to be heard by a fairly selected and representative neutral,⁸⁵ and to have their voices recognized, then this form of procedural justice may result in a high degree of satisfaction for participants even if it does not really address broader social justice concerns or guarantee the application of legal norms.⁸⁶ Focusing on “process elements—voice, consideration, even-handedness and dignity”⁸⁷ allow dispute resolution systems to “meet disputants’ desires for procedural justice without having third-party neutrals make factual and legal determinations.”⁸⁸ Accordingly, mediators can orient themselves towards delivering procedural justice by paying attention to party opportunities to be heard and treated with respect and dignity in the process without affecting the parties’ self-determination about how to resolve their dispute.

2. *Mediation’s Scope: Mediator Orientation Guided By Party Self-Determination*

i. *Defining Mediator Orientations*

Although justice is hard to define, explaining mediation provides no easy task either. One might easily understand mediation as “an informal, consensual process in which a neutral third party, without power to impose a settlement assists disputing parties in reaching a mutually satisfactory resolution.”⁸⁹ Although there are a number of approaches and explanations available, I like the definition of mediation as “a social process in which a

grievance outcome”); Menkel-Meadow, *supra* note 61, at 61 (“As the procedural justice literature has told us, parties may be content with an ability to be heard by a third person neutral if they are convinced the process is otherwise fair.”).

84. See, e.g., Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573 (2004); Nancy A. Welsh, *Disputants’ Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, 2002 J. DISP. RESOL. 179 [hereinafter, Welsh, *Decision Control*]; Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization*, 6 HARV. NEGOT. L. REV. 1 (2001); Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What’s Justice Got to Do With It?*, 79 WASH. U. L.Q. 787 (2001) [hereinafter, Welsh, *Making Deals*].

85. Menkel-Meadow, *supra* note 61, at 47 n.116 (“Clearly, the perceived fairness of such a program depends on the perceived fairness and diversity of the mediators . . .”).

86. See Welsh, *Making Deals*, *supra* note 84; see also Bingham et al., *supra* note 66, at 357 (describing the transformative model of mediation employed by the United States Post Office in employment discrimination claims and how that model is consistent with procedural justice by “emphasizing opportunities for voice and control”).

87. Sternlight, *supra* note 17, at 298 (quoting Welsh, *Decision Control*, *supra* note 84, at 187).

88. *Id.* (quoting Welsh, *Making Deals*, *supra* note 84, at 838-58).

89. Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Without Law*, 74 WASH. U. L.Q. 47, 52-53 (1996).

third party helps people in conflict understand their situation and decide for themselves what, if anything, to do about it.”⁹⁰ This definition places much more emphasis on the party determination role and the necessary orientation for the mediator to play a very deferential role in that process.

Mediators can adopt various styles depending upon the situation at hand.⁹¹ There are typically either two or three types of mediator orientations: evaluative, transformative, and facilitative.⁹² With the “evaluative” mediation approach, the mediator focuses on the parties’ legal dispute by analyzing the constraints of the law involved and assessing the relative strengths of each side’s legal position to assist the parties in reaching a resolution.⁹³ In contrast, in facilitative mediation, the mediator does not “give evaluations nor . . . suggest settlement options” and instead focuses on getting “conversation moving in the direction of settlement.”⁹⁴ In transformative mediation, the expectation is that the process may “generate transformative effects . . . that are highly valuable for the parties and for society” by allowing “the parties to make real connections across ingroups . . . that . . . can lead to changed attitudes that will spill over into other areas.”⁹⁵

Some commentators have asserted that transformative mediation is really a subset of facilitative mediation, which would leave only two primary types, facilitative and evaluative.⁹⁶ However, unlike facilitative or evaluative mediation, transformative mediation is “not premised upon forcing the participants to settle.”⁹⁷ Regardless, I am particularly skeptical of the assumptions related to the so-called transformative mediation

90. Dorothy J. Della Noce et al., *Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy*, 3 PEPP. DISP. RESOL. L.J. 39, 39 (2002).

91. See generally Dwight Golann, *Variations in Mediation: How—and Why—Legal Mediators Change Styles in the Course of a Case*, 2000 J. DISP. RESOL. 41 (arguing that mediators in legal disputes often change styles many times throughout the process and it is necessary to do so when mediating legal disputes); Leonard Riskin, *Understanding Mediators’ Qualifications, Strategies and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 13-16, 35-36, 40-41 & nn.90-91 (1996) (referring to various techniques employed by mediators).

92. Dolder, *supra* note 42, at 332-33; Zena Zumeta, *A Facilitative Mediator Responds*, 2000 J. DISP. RESOL. 335, 335.

93. Yelnosky, *supra* note 40, at 601.

94. Butcher, *supra* note 41, at 256.

95. *Id.* at 260.

96. Stempel, *supra* note 14, at 384 (“[A]lthough transformative purists will probably disagree, I have generally regarded transformative mediation as a subset of facilitative mediation.”); Talbot, *supra* note 43, at 652 (referring to “two basic styles, or approaches, that mediators follow: the facilitative approach and the directive approach” with the facilitative approach being “called an ‘interest based’ or ‘transformative approach’” and “the directive approach, also called an ‘evaluative’ or ‘rights-based’ approach”).

97. Butcher, *supra* note 41, at 256.

approach⁹⁸ because the glow of it transcends the focus on doing what the parties want and can become more of a focus on what the mediator wants.⁹⁹ Nevertheless, transformative mediation has been consistently used by the largest civilian employer in this country, the United States Postal Service.¹⁰⁰ Although it has been argued that this program was desired by the client,¹⁰¹ it represents the desires of only one of the clients, the employer who selected that framework, not the individual employees in each dispute.

Whether a mediator is facilitative, evaluative, or transformative appears to be more of a concern among academics without regard to actual practices employed by mediators.¹⁰² These various approaches to mediation merely identify a number of skills that a mediator may employ depending on the particular situation at hand and should not become a set

98. See Della Noce et al., *supra* note 90, at 51 (noting that this “model assumes that the transformation of interaction [between parties] itself is what matters most to parties in conflict—even more than settlement on favorable terms”); see also Robert A. Baruch Bush & Sally Ganong Pope, *Changing the Quality of Conflict Interaction: The Principles and Practice of Transformative Mediation*, 3 PEPP. DISP. RESOL. L.J. 67 (2002).

99. See Jeffrey R. Seul, *How Transformative is Transformative Mediation?: A Constructive-Developmental Assessment*, 15 OHIO ST. J. ON DISP. RESOL. 135, 157-67 (1999) (describing limitations of the transformative mediation approach); Subrin, *supra* note 39, at 220 n.119. (criticizing the transformative mediation approach).

100. Della Noce et al., *supra* note 90, at 52 (describing the development of transformative mediation with the United States Postal Service (USPS) in handling its employment disputes). For more detailed descriptions of the results from the USPS transformative mediation program called REDRESS, see Tina Nabatchi & Lisa B. Bingham, *Transformative Mediation in the USPS REDRESS Program: Observations of ADR Specialists*, 18 HOFSTRA LAB. & EMP. L.J. 399 (2001); Robert A. Baruch Bush, *Handling Workplace Conflict: Why Transformative Mediation?*, 18 HOFSTRA LAB. & EMP. L.J. 367 (2001); Hallberlin, *supra* note 66.

101. Della Noce et al., *supra* note 90, at 58 (“To borrow the rhetoric of the field, transformative mediation was what the client wanted.”).

102. See Jeffrey W. Stempel, *Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator's Role*, 24 FLA. ST. U.L. REV. 949 (1997) (asserting that various academic arguments about whether one approach to mediation is better than another is the wrong focus and that the focus should be on which approach is more appropriate under the circumstances or even if a mixture of the approaches may be appropriate depending on the needs of the disputants in that situation); see also Stempel, *Fuzziness*, *supra* note 16, at 310 (arguing “that the legal profession is better off addressing the pragmatic operational question of mediation and other disputing devices rather than arguing over what constitutes “true” or “acceptable” mediation”); see also Richard Birke, *Evaluation and Facilitation: Moving Past Either/Or*, 2000 J. DISP. RESOL. 309, 319 (asserting that the evaluative and facilitative distinction should no longer be a focus as there are many more pressing concerns about the use of mediation); Stempel, *supra* note 14, at 379 n.23 (describing a debate about whether “reality testing” through pointed questioning as facilitative mediation versus “neutral evaluation” by specifically asserting a concern about an option rather than doing it through questioning and whether this alleged distinction really suggests that “fidelity to a term or theoretical concept can get in the way of real world applications of ADR”). But see John Lande, *Toward More Sophisticated Mediation Theory*, 2000 J. DISP. RESOL. 321 (asserting the importance of the facilitative approach to mediation in establishing key values for mediators); Stempel, *supra* note 14, at 380, 388 (finding some value in the facilitative-evaluative debate as the academic community invested in the facilitative approach can operate as a check on those mediators who view their roles as omnipotent evaluators).

orientation.¹⁰³ Instead, the mediator's orientation should be to discover and focus on what the parties want and decide how to help them find possible agreement by exploring their mutual interests.

Accordingly, the actual orientation should be one of self-actualization for the parties. It does not involve a focus on settlement or changing relationships unless that is what the parties want. What I refer to as the Self-Actualizing Party mediator or SAP mediator does not assume that he or she will achieve such lofty goals as therapeutic jurisprudence¹⁰⁴ or social justice¹⁰⁵ or even transforming relationships of the parties unless the parties' needs suggest that accomplishing these goals would be of value in the mediation. The focus of the SAP mediator is to assess what the parties' needs are and then act accordingly.¹⁰⁶

ii. *Matching Orientations with Realistic Mediation Parameters*

Jeffrey Stempel correctly notes that "odes to ADR and the anti-conflict, anti-judgmental rhetoric is too fuzzy," and that it rarely focuses on how "litigation and ADR activities actually function."¹⁰⁷ Stempel also argues that despite being "surrounded by large doses of rhetoric about freedom and self-determination . . . ADR, in practice, reflects insufficient examination of the degree of freedom actually in evidence and the degree to which it is mal-distributed according to class, status, wealth, race, and gender."¹⁰⁸ Based upon these concerns, the mediator's role is to figure out what the parties want and see if there is a possibility of helping the parties reach a mutual agreement about how to resolve their conflict. Providing opportunities for procedural fairness is all the justice that a mediator can deliver without knowing the parties' goals and while still acting under the parameter of party self-determination. Mediation must be flexible to

103. See Cindy Fazzi, *A Mediation Style That Combines Many Others Situational Mediation: Sensible Conflict Resolution*, DISP. RESOL. J., July 2004, at 86 (reviewing book by Oliver Ross, describing situational approach to mediation as combining all the various styles and applying them when needed depending upon the situation at hand).

104. See Waldman, *supra* note 15.

105. See Isabelle R. Gunning, *Know Justice, Know Peace: Further Reflections on Justice, Equality and Impartiality in Settlement Oriented and Transformative Mediations*, 5 CARDOZO J. CONFLICT RESOL. 87, 95 (2004) (arguing that mediators must not just be "conflict stoppers" but must also be charged with serving justice).

106. See Robert A. Creo, *Mediation 2004: The Art and the Artist*, 108 PENN. ST. L. REV. 1017, 1041-42 (2004) (describing Maslow's hierarchy of needs). According to Robert Creo, mediators must decide what are "critical and actual tipping points for the decision makers" and how Maslow's pyramid of needs listed from "top to bottom: self-actualization; esteem; love (social); safety; physiological" demonstrate non-linear bases for decision making and how the lower level needs are the ones that most people focus on and are the most dominant needs even though truly healthy people will then seek the highest level of need, self-actualization. *Id.*

107. Stempel, *Fuzziness*, *supra* note 16, at 353.

108. *Id.*

address the situation at hand rather than hindered by some formalistic orientation or predetermined approach to mediation.¹⁰⁹

Regardless of all the possible mediator orientations discussed and the justifications for them, the reality is that even mediators do not always readily recognize when they apply one of these various orientations when mediating workplace disputes.¹¹⁰ Accordingly, it is incumbent upon mediators to focus consciously on their approaches before applying any of these orientations. Mediators should consider how their behavior can match certain "cardinal virtues [within the parameters of the mediation] process [which] can be self-determination, autonomy, empowerment, transformation, and efficiency."¹¹¹ Of course, a mediator must continue to "reality-test" with the parties through questioning to make sure the mediator has not adopted an orientation that the parties do not desire. Professor Nolan-Haley has explained the parameters of mediation as follows:

Unlike decision making by a neutral third party in the adjudication process, decision making in mediation rests solely with the disputing parties. Some commentators consider mediation to be a fairer process than adjudication because the affected parties have complete authority in selecting what values will govern the resolution of their dispute. Finally, mediation is thought to result in greater litigant satisfaction as compared to judicial adjudication of disputes. There has been a significant amount of scholarly activity directed toward testing and validating these assumptions

Conventional wisdom concerning mediation holds that substantive law is not dispositive in the mediation process—it operates simply as a template to show what might be available in a more formal, legalistic setting. Instead of law, free-standing normative standards govern in mediation, and parties actually affected by a dispute decide what factors should influence the efforts to resolve that dispute. Thus, the moral reference point in mediation is the self. Individualized notions of fairness, justice, morality, ethics, and culture may trump the values associated with any objective framework provided by law.¹¹²

These parameters raise a number of questions with respect to justice in mediation. One question is whether the mediator must take some affirmative steps to insure legal fairness when one party involved in the mediation is much more powerful than the other party. Is the mediator's

109. Stempel, *supra* note 14, at 376 (describing how "it may be that one 'size' of mediation does not fit all" and asserting that mediation must allow "the mediator substantial discretion to do what he or she thinks best in each particular case").

110. L. Camille Hebert, *Establishing and Evaluating a Workplace Mediation Pilot Project: An Ohio Case Study*, 14 OHIO ST. J. ON DISP. RESOL. 415, 433 (1999) (describing how mediators and parties view mediator's performance quite differently, with parties describing behavior that sounds very much like evaluative mediation and mediators describing their behavior in ways that reflect the facilitative mediation model).

111. Nolan-Haley, *supra* note 89, at 54.

112. *Id.* at 55-56 (footnotes omitted).

role in facilitating negotiation to provide a level playing field? Would that help facilitate negotiation or would the stronger party view the mediator as being partial to the weaker party? Also, if the mediator tries to remain allegedly neutral while facilitating negotiation, does that mean the mediator has merely operated as a tool for the stronger party to hammer the weaker party? Should a mediator be concerned about these issues and, if so, what can or should a mediator do? Further, should the mediator seek to transform the parties' relationship when all the parties want is a way to quickly settle their dispute?

However, these questions are extraordinarily difficult to answer and ultimately it is unnecessary to do so. They should not be the focus for a mediator in an employment dispute. Given that mediation is a process "heralded because of its focus on self-determination," it is strange "for ADR scholars to advocate bright-line, legalistic rules to remedy problems" created in that process.¹¹³ Other than refusing to go forward with the mediation, a mediator cannot achieve substantial distributive justice unless the parties agree to it or it is part of the system design. And imposing the mediator's view of distributive or social justice raises major concerns when operating under the cloak of private dispute resolution. The informal mediation process does not provide for the type of public scrutiny and application of societal norms that a distributive justice system would warrant. Instead, this form of justice would involve the mediator's own assessment of what is just in that particular situation given the mediator's understanding of how to distribute resources based upon societal and legal norms even if that assessment is a wrong assessment of societal or legal norms, and it would clearly conflict with or be contrary to the desires of the parties and the overriding goal of party self-determination.

3. Dealing With Power Imbalances: Ignoring Neutrality Myths and Pursuing Mediator Activism Solely for Party Self-Determination

i. The Realities of Mediator Neutrality

When issues of power imbalance¹¹⁴ between parties exist, some believe that it becomes an issue of major concern for the mediator. As one commentator has recently explained:

This presents a real dilemma for the mediator; if the third party intervenes to rectify power imbalance this may give rise to an accusation of bias

113. See Peter N. Thompson, *Enforcing Rights Generated in Court-Connected Mediation—Tension Between The Aspirations of a Private Facilitative Process and the Reality of Public Adversarial Justice*, 19 OHIO ST. J. ON DISP. RESOL. 509, 550 (2004).

114. See Jordi Agusti-Panareda, *Power Imbalances in Mediation: Questioning Some Assumptions*, DISP. RESOL. J., July 2004, at 24.

against the controlling party. If he or she omits to do anything, the failure to act is likely to perpetuate the power disparity. This might lead to the conclusion that if neutrality is equated with passivity, then just outcomes will be more difficult to attain through the use of workplace mediation. Moreover, an inexperienced or unaware mediator has the potential to create more power imbalances than might be present in the first place if there is a narrow perception of what constitutes neutrality.¹¹⁵

However, this dilemma represents a red herring under the guise of the mediator neutrality myth.¹¹⁶ If mediators take a hands-off approach under the guise of being neutral in an employment discrimination dispute, it could likely involve perpetuating an imbalance of power between the weaker employee party and the stronger employer party.¹¹⁷ Instead, if you look at self-determination as the goal for what the parties want, no weaker party would want the mediator to stand by passively and foster an agreement that perpetuates bias.¹¹⁸

Some commentators have asserted that delivering just outcomes should be a goal of mediation and society should step in to make sure that it occurs in the mediation process.¹¹⁹ However, a mediator's basis for intervention

115. Dolder, *supra* note 42, at 335-36.

116. Coben, *supra* note 59, at 73-74 (describing the "fiction" of neutrality and asserting "only in the mythological world of mediation could silence ever be considered neutral"); Dolder, *supra* note 42, at 337 (asserting that claims of mediator "neutrality are neither achievable nor desirable"); Wallace Warfield, *Building Consensus for Racial Harmony in American Cities: Case Model Approach*, 1996 J. DISP. RESOL. 151, 157-58 (recognizing that, for third-party interveners in deep-rooted racial conflicts, "neutrality" is a myth that cannot really exist); Weckstein, *supra* note 50, at 509-10 (describing how some define mediation as requiring "that the mediator be neutral or impartial" and asserting that "it is neither realistic in all cases nor an essential ingredient of the process").

117. See James J. Alfani, *Trashing, Bashing and Hashing It Out: Is this the End of "Good Mediation"?*, 19 FLA. ST. U. L. REV. 47, 71 (1991) (describing how the difficulty with the "hands-off style, given the number of mediations that occur as a requirement of court-mandated procedures, may lead to the perception that spending time in trying to facilitate is a waste of time); Berger, *supra* note 17, at 533 (describing how "employment mediations generally . . . do entail some power imbalance in favor of defendants"); Dolder, *supra* note 42, at n.76 (citing Alfani and finding that "[a]llowing too much time for empathizing, reframing and the other tools in the successful facilitative mediator's tool box might be perceived as weak and ineffective in a court-mandated environment"); see also Gunning, *supra* note 105, at 91-94 (lamenting the claims of those transformative mediators who claim they must do nothing in the face of a potential imbalance of power as part of being neutral and suggesting that activism on the part of mediators in those circumstances is necessary).

118. Weckstein, *supra* note 50, at 503, 511 (asserting that a party who "is unaware of relevant facts or law that, if known, would influence that party's decision cannot engage in meaningful self-determination").

119. See Stempel, *supra* note 14, at 374-75 & n.15 (referring to mediation as a defeat even if all the parties are satisfied if the result does not adhere to legal norms, and asserting that mediation should not go forward without some regulation because the best "slogan might be power to the parties, but not absolute power to the parties or to any single party"); see also Sternlight, *supra* note 17, at 304 n.76 (asserting that "[b]ecause disputes and dispute resolution affect the public as well as disputants, I believe this [the decision about whether a dispute is to be mediated] should be, in part, a societal decision, and not merely left to disputants").

should not rest upon reaching just outcomes as Stephen Subrin has explained:

I think mediators should be extremely hesitant about ever saying what they think the correct result of a mediation should be or what they think a judge or jury would determine. The mediators will almost always lack information. Even when one is dealing with her own client, a lawyer is not quite sure she has the whole story of what the client knows, let alone what the other clients and witnesses know. It is foolish to assume the parties and lawyers tell the mediator everything they know that is relevant to a settlement. So far as I have been able to determine, the skillful lawyer at a mediation, as well as the skillful client or party without a lawyer, is doing two things simultaneously: she is being an advocate trying to convince the mediator of her position and to convince, or soften, the previous convictions of the opposing parties and lawyers, and she is being cooperative and sharing (or at least giving that appearance) in an attempt to gain a settlement, and perhaps even increase the combined value of what can be achieved through settlement. The advocacy part of the performance will not permit all information to be placed either on the table or communicated to the mediator confidentially. Even if the mediator knew everything, she would be plagued with the uncertainties about litigation¹²⁰

Rather, any mediator intervention should only be based upon accomplishing the mutual objectives of the parties. In some situations, weaker parties may decide they want a result that the mediator may not perceive as just. If, in the mind of the mediator, the weaker party is deciding to pursue this result with informed consent, then the mediator's role should be only to help foster a mutual agreement that will meet that party's goals and provide procedural justice throughout the process.

In an effort to reconcile purported mediator neutrality with mediator activism in the context of an employment dispute, Donald Weckstein has argued that mediators should become activists to insure party empowerment and self-determination.¹²¹ Weckstein also found that "employment discrimination" disputes are best approached by norm-advocating

120. Subrin, *supra* note 39, at 220 n.123. Jeffrey Stempel, one of the advocates for using legal norms in the mediation process, assumes that the foundation provided by the court system provides adequate norms from which to draw upon in advocating certain norms in mediation. Stempel, *supra* note 14, at 382 (noting his assumption that the default legal regime as a source of norms is an adequate one). However, the default legal regime for employment discrimination law has been increasingly criticized and its empirical results suggest an anti-plaintiff bias that does not offer a worthy norm to translate into ADR. See Clermont et al., *supra* note 20 (identifying anti-plaintiff effect in results for employment discrimination claimants in federal courts); Selmi, *supra* note 20 (asserting that proof of intent represents certain legal norms that make it difficult for plaintiffs to prevail in employment discrimination claims); Berger, *supra* note 17, at 499-50 (describing the "daunting task" of prevailing in an employment discrimination claim because of "doctrinal hurdles" related to burdens of proving a disparate treatment claim of employment discrimination).

121. Weckstein, *supra* note 50, at 504, 563.

mediators.¹²² As a result, Weckstein offered a couple of solutions to the dilemma of balancing party self-determination with mediator neutrality in an employment dispute.¹²³ After advising the employee to seek legal counsel, Weckstein also suggested that one additional response may include asking the counsel for the employer to explain the law if the employee is unable to hire his own attorney. However, Weckstein recognized that the employer's counsel may be resistant to explain the law to the employee.¹²⁴ Another option that Weckstein has suggested is to get the parties to agree that legal norms may play a role in reaching informed consent and to seek permission from the parties allowing the mediator to discuss those legal norms with either party, as requested. Again, the employer's counsel may recoil at this suggestion because counsel can fill that role for the employer and the lack of counsel for the employee is not the employer's concern and may even put the employer at an advantage.

These are all good options for any employment discrimination mediator who is concerned that an employee may not understand the legal norms involved or will accept an agreement without consideration of those legal norms. Such an agreement would suggest a lack of informed consent. Also, because the mediator has suggested all of these options, even if the employer's counsel refuses, it may highlight to the employee that it is imperative to seek counsel. Finally, the mediator may withdraw if still concerned about the power imbalance between the parties.

ii. Power to the Parties, Not Power to the Mediator

Those who have argued for the mediator to be able to deliver justice in outcomes are not dealing in reality and are placing too much power in the hands of the mediator, who already plays such an influential role in how the parties resolve their dispute.¹²⁵ In fact, we should be concerned about mediators taking too much control either directly or indirectly because they think they understand how the dispute should be resolved and they want to "drum some sense" into the parties.¹²⁶ Thus, asserting that mediators should deliver justice opens up the mediation process to being misused "in the name of justice" as those mediators impose their own terms on the parties.¹²⁷ Mediators do not hear enough of the dispute from both sides or

122. *Id.* at 507, 562.

123. *Id.* at 560-63.

124. *Id.* at 561.

125. Coben, *supra* note 59, at 74 (referring to concerns about self-determination and neutrality as being marshaled as the cornerstone concepts of mediation when "the practice reality is the routine, but undisclosed mediator exercise of influence").

126. *Id.* at 77.

127. *Id.* (describing how "real justice will remain elusive so long as mediation mythology . . . and mediation practice is marked by active (and most commonly) surreptitious spinning of the

from all witnesses to be in a position to effectively determine whether a proposed resolution to a dispute represents a fair legal outcome.¹²⁸

Of course, mediators should use effective questioning and “reality testing” to ensure informed consent and to facilitate the parties’ objectives.¹²⁹ Certainly some mediators will be chosen with the goal of effectuating social justice.¹³⁰ However, the whole process of mediation would break down if the mediator considers his or her primary role as doing justice between the parties by making sure the outcome complies with the mediator’s view of what the existing legal norms are. No party wants to necessarily reach an agreement that presents substantively unfair terms. But the mediator should not make that call. Parties who are paying for the time of the mediator and possibly their own lawyers and investing their own time would likely be surprised to find that their mediator believes the most important thing is to reach a just result in the view of the mediator.¹³¹

Rather, the mediator must assess how much of a social justice goal fits the desires of the parties on an individual case-by-case basis and act accordingly. In those rare circumstances where a mediator believes that an agreement reached in mediation will effectuate social injustice and the parties still want to proceed with that agreement after being fully informed and subjected to thoughtful questioning by the mediator, then the mediator always has the option to withdraw.¹³² But the mediator could be wrong in assessing the legal norms because he or she lacks all the information necessary to make an informed evaluation.¹³³

Those who argue for social justice in mediation have become unrealistic and have forgotten about the pragmatic concerns in deciding

conversation”). Although Coben is concerned about the mediator’s focus on settlement rather than justice, I think that allowing the mediator to focus on notions of justice may also allow too much influence on the part of the mediator under the guise of delivering justice.

128. See Subrin, *supra* note 39, at 220 n.123.

129. See Lela P. Love & Kimberlee K. Kovach, *ADR: An Eclectic Array of Processes, Rather than One Eclectic Process*, 2000 J. DISP. RESOL. 295, 303-05 (describing the difference between reality testing and evaluative questioning); Weckstein, *supra* note 50, at 521 (referring to “Socratic dialogue . . . as a form of reality testing (a technique also used by facilitative mediators) to educate the parties and move them toward an appropriate settlement”).

130. See Isabelle R. Gunning, *Diversity Issues In Mediation: Controlling Negative Cultural Myths*, 1995 J. DISP. RESOL. 55, 88-90 (asserting that in order to address concerns of racial or gender justice, the parties may select mediators on the basis of race or gender).

131. See Subrin, *supra* note 39, at 220 n.123.

132. See Weckstein, *supra* note 50, at 553-54 (describing the approach of withdrawing from the mediation when the mediator perceives a “bad” or unfair outcome” and referring to the approach of mediator Gary Friedman, he will not usually express an “opinion about the fairness of the agreement” unless he is convinced it is “grossly unfair.” *Id.* However, if he believes it is “grossly unfair” and the parties still want to go forward despite his objection, he “will resign as mediator” because “as mediators, we cannot pretend that we are value free, even in situations where it is desirable to keep our beliefs from intruding.” *Id.*

133. Subrin, *supra* note 39, at 220 n.123.

what represents justice in an individual dispute in which they are not actual participants and have no obligation to work with that party in pursuing justice after the mediation ends. Of course, the background and skills of the mediator and his or her own experiences may foster the ability to raise questions and help the parties explore options including the opportunities for some form of social justice.¹³⁴

iii. *Reject Most Predetermined Mediator Approaches*

Similar to my concerns about those who are proponents of transformative mediation, I am skeptical of those who make claims about seeking to deliver social justice and desire to apply so-called legal norms in mediation prior to meeting with the parties and assessing what the parties want. Any notions of such social justice may be a happy byproduct but should not be the focus of the mediator before he or she has even met the parties and investigated the parties' interests and goals and used questioning to test certain values and expectations. As one commentator has demonstrated, mediation can present problems when the mediator has already predetermined that he or she will focus on issues of forgetting the past or neglecting hurt feelings, as some mediators are primed to do as a matter of course or technique to get the parties to focus on their current interests rather than what has already happened to them.¹³⁵

Instead, by taking a deliberatively open and conscious approach to doing what the parties want, mediators can alleviate concerns about power imbalances, especially in comparison to the court process.¹³⁶ Another commentator has recently suggested that mediation does not necessarily foster power imbalances because it is voluntary, consensual, and non-adversarial. Accordingly, mediation also arguably allows a party who is "at a disadvantage" to "always call a halt to the mediation" if there is a problem, and a "mediator has a vital role in ensuring that the parties have real control over the outcome."¹³⁷ Even if power imbalances exist, mediation allows and encourages party participation that provides a mechanism to draw out and address power imbalances rather than

134. Gunning, *supra* note 130, at 86-93 (describing situations where social justice concerns may require intervention by the mediator).

135. See Carrie J. Menkel-Meadow, *Remembrance of Things Past? The Relationship of Past to Future in Pursuing Justice in Mediation*, 5 CARDOZO J. CONFLICT RESOL. 97, 112-13 (2004).

136. See Jeffery R. Seul, *Settling Significant Cases*, 79 WASH. L. REV. 881, 939 (2004) (acknowledging that "the risk [of problems with power imbalance in mediation] is real, [but] it is minimized significantly in any well-facilitated deliberative process—perhaps minimized to the point that the risk of disempowerment is less than that which weaker individuals face in court").

137. Agusti-Panareda, *supra* note 114, at 29.

proceeding in court or settling privately where attorneys may play a more decisive role that just perpetuates those imbalances.¹³⁸

Any predetermined focus on a particular methodology that does not necessarily focus on what the parties want allows the mediator to have too much of an influence on the process by following the dictates of the mediator rather than the dictates of the parties.¹³⁹ Having a predetermined approach constrains the use of other approaches a party may desire or need.¹⁴⁰ For example, even a predetermined focus on problem solving or settlement can neglect the importance of “legal and moral” issues in a particular conflict.¹⁴¹ Other than a predetermined approach to provide procedural justice and focus on party self-determination, whether there are party power imbalances or not, mediator activism should not try to deliver social or distributive justice absent clear party agreement and up front disclosure by the mediator to the parties of an intent to do so. Any other forms of justice beyond procedural justice will have to ultimately come from the parties, not the mediator. The most likely party to make that move would be the employer who has the bargaining power to design a conflict resolution system that allows for various forms of justice.

IV.

WORKPLACE CONFLICT RESOLUTION DESIGN: MEDIATION OF EMPLOYMENT DISCRIMINATION CLAIMS IN THE TWENTY-FIRST CENTURY

Employers have unique incentives to develop fair conflict resolution procedures, and mediation can offer opportunities for successful measures in addressing workplace discrimination issues.¹⁴² Dennis Nolan has

138. See Seul, *supra* note 136, at 940.

139. See Della Noce et al., *supra* note 90, at 47-49 (describing how mediator decisions about structure can influence the process); see also Bush & Pope, *supra* note 98, at 72 n.7 (recognizing that there are other theories in support of why parties seek mediation and accepting that the transformative model does not provide a definitive answer but arguing that other models don't do so either); see also Gunning, *supra* note 105, at 90-91 (raising concerns about transformative mediation in that it fails to recognize and address concerns about imbalances of power and social justice).

140. See Della Noce et al., *supra* note 90, at 60 n.81, 63 (showing how even the creators of the transformative approach acknowledge that asserting that one approach is the normative approach runs contrary to other approaches and will “constrain others”).

141. Stempel, *Fuzziness*, *supra* note 16, at 352 (describing a hypothetical problem in an ABA negotiation competition and criticizing its unrealistic focus on the problem solving model because the “heinous conduct of [one party] was comparatively minimized as were the undoubted emotions that must have arisen” because of that conduct in order to “smooth[] over past differences for a comparatively modest fee” because the “‘problem solving’ [approach] usually only works when all disputants are acting in good faith”).

142. Due to a concern for diversity in their ranks, corporations have a strong interest in rooting out workplace discrimination. See Michael Z. Green, *Addressing Race Discrimination Under Title VII After Forty Years: The Promise of ADR as Interest-Convergence*, 48 HOWARD L.J. 937, 959-63 (2005).

identified the following “minimal elements” or factors to consider in designing a just system for employment dispute resolution based upon the contractual intentions of the parties: selection of the third-party neutral, procedural rules, remedial authority, and allocation of costs.¹⁴³ In looking at the design of a mediation program, employers should consider these factors along with addressing the balance of power for employees while offering mediation at its earliest opportunity.¹⁴⁴

In adopting conflict resolution and mediation procedures, employers must provide employees a fair opportunity to have lawyers represent their interests in these disputes.¹⁴⁵ If employers do not become proactive about this, Congress may step in and provide more incentives for plaintiffs’ attorneys to seek legal fees¹⁴⁶ or unions may step in and fill the legal representation void.¹⁴⁷

Surprisingly, a number of employers offer legal representation to their employees because it helps both the employee and the employer in the alternative dispute resolution process.¹⁴⁸ In doing so, these employers can

143. See Dennis Nolan, *Labor and Employment Arbitration: What's Justice Got to Do with It?*, DISP. RESOL. J., Nov. 1998, at 40, 46.

144. See Berger, *supra* note 17, at 516 & n.192 (advocating the earliest possible use of mediation for its greatest value and noting “widespread agreement” in support of using mediation at the earliest possible time); Gourlay & Sodequist, *supra* note 41, at 286 (advocating same); LaRue, *supra* note 40, at 492 (advocating the use of ADR at its earliest stages to have the greatest value).

145. Bingham et al., *supra* note 66, at 344, 345 (“Representation is one element of dispute system design, an element that is judged to be fundamental to fairness . . .” and “[a]n employment dispute resolution program that promotes employee direct participation, with any representative of his or her choice, might similarly have a positive effect on how employment disputes get processed.”); Berger, *supra* note 17, at 535-36 (noting that “power imbalance is surely greatest in cases of lopsided representation” and asserting that the “best practice” would be for the employer to provide counsel for employees); Green, *supra* note 32, at 73-75 (describing the difficulties in employment discrimination mediations for a claimant without legal counsel).

146. The Civil Rights Act of 2004, introduced by Senator Kennedy, was intended to not only ban mandatory arbitration of statutory employment discrimination claims, but also to provide further clarity and potential for lawyers representing civil rights plaintiffs to obtain attorney’s fees. See Green, *supra* note 32, at 60 n.15 (describing purposes of the Civil Rights Act of 2004, and citing Ritu Kelotra, *Fairness: The Civil Rights Act of 2004*, POVERTY & RACE (Poverty & Race Research Action Council, Washington, D.C.), Mar.-Apr. 2004, at 5, available at <http://www.prrac.org/newsletters/marapr2004.pdf>).

147. See Michael Z. Green, *Opposing Excessive Use of Employer Bargaining Power in Mandatory Arbitration Agreements Through Collective Employee Actions*, 10 TEX. WESLEYAN L. REV. 77, 98-108 (2003) (describing incentives for unions to help level the playing field for individual employees subjected to mandatory arbitration agreements); see also Bingham et al., *supra* note 66, at 376-77 (finding that “union representation during mediation sessions may have benefits for both the employee and the employer” and asserting that individuals join unions as “associate members” in order to receive some benefits of having unions represent them in mediation); Menkel-Meadow, *supra* note 61, at 47 (describing the possibility that mandatory arbitration “may lead to an increased spurt of unionization or other collective action on the part of employees”); see also Yelnosky, *supra* note 40 (advocating the use of employee caucuses to bridge the representation gap in mediation).

148. Berger, *supra* note 17, at 536; Michael Z. Green, *Ethical Incentives for Employers in Adopting Legal Service Plans to Handle Employment Disputes*, 44 BRANDEIS L.J. (forthcoming 2005) (describing

point to a real advantage for their employees versus other employers whose employees must find counsel to help them navigate the dispute resolution system.¹⁴⁹ Lawyers, as repeat players, become a stabilizing effect on the fairness of the mediation process. They also help remove concerns about unauthorized practice of law, and lack of informed consent. Although the lack of attorney involvement in mediating Title VII claims represents a significant concern,¹⁵⁰ mediators, through the implementation of procedural justice and self-determination principles, should make sure that the parties have an opportunity to effectively participate in mediation and that the lawyers do not dominate the parties in the proceedings.¹⁵¹

Because the mediator plays such an important role, the process for selecting the mediator must be fair and not coercive. To accomplish this goal, employers must allow employees the ability to have legal counsel who can advise employees in the mediator selection process. Also, the employee should have some rights to reject the selection of mediators that the employee or the employee's counsel have concerns about. Mediator selection should be a collaborative and involved process for all parties. Furthermore, the process must allow victims of employment discrimination under Title VII to have realistic opportunities to choose people of color and women as the mediator in order to ensure the perception of fairness.¹⁵² This can be achieved by making sure that there is a viable and critical mass pool of mediators of color and women to choose from in the final mediator selection process.

situations where employers have advantages when choosing legal service plans to help their own employees obtain legal counsel in resolving employment disputes through the use of ADR and suggesting continued growth in the adoption of these plans by employers); Green, *supra* note 32, at 114-15 (describing the Brown & Root Legal Service Plan provided to its employees); Green, *supra* note 142, at 968 (same).

149. See Green, *supra* note 148 (asserting that employers can derive significant human resource benefits by providing their employees with legal representation through legal service plans even when employees use the legal services for representation in disputes with their own employers).

150. See Berger, *supra* note 17, at 500 (describing workers' difficulties in hiring a lawyer for discrimination claims); Green, *supra* note 32, at 73-75 (same).

151. See Subrin, *supra* note 39, at 222 n.127 ("Clients can tell their story to the mediator, even when the lawyer does not want the client to talk in front of the other side."); see also Butcher, *supra* note 41, at 254 (describing concerns about "allowing attorneys to become too empowered in the resolution of the dispute, thus detracting from the voices of the participants").

152. See Berger, *supra* note 17, at 537 (noting that "[c]ompanies further enhance the appearance and the reality of fair process when they permit the employee to participate in choosing the mediator" as "[s]uch latitude makes good sense; especially if the employer pays the mediation outfit's fees, the employee might otherwise fear that the mediator will not be impartial"); Michael Z. Green, *An Essay Challenging the Racially Biased Selection of Arbitrators for Employment Discrimination Suits*, 4 J. AM. ARB. 1, 49-57 (2005) (asserting the benefits of having a diverse pool of qualified arbitrators and mediators of color to be selected by employees of color in resolving employment discrimination disputes in order for the conflict resolution system to be perceived as fair).

Although some feel that legislative and legal change are the only ways to get employers to respond to employment discrimination,¹⁵³ some employers already use fair conflict resolution systems. These systems include the type of fair mediation procedures that level the playing field for employees by offering legal representation, minimizing costs, and allowing employees to pursue court action if unsuccessful in mediation.¹⁵⁴

A 2002 survey describes twenty employer dispute resolution programs that offer some hope for fair employment dispute resolution. Some of these programs offer either “incentives” or “rewards” as motivation for employees to obtain independent counsel, an important concern in making sure the program is fair.¹⁵⁵ As an example of a broad dispute resolution program that attempts to level the playing field, the Shell RESOLVE program offers many steps before culminating in mediation and then it allows arbitration as an optional choice where the employee may still file suit in court afterwards.¹⁵⁶ This type of program can allow a fair and quick result. And in those rare situations where a public and formal adjudication is necessary, an employee who needs that formal judicial forum to obtain justice may still seek that method of resolution.

Thus, while recognizing the value and necessity of conflict rather than viewing it as unhealthy, successful resolution can still proceed through developing fair mediation processes as part of a comprehensive conflict resolution program designed to tackle employment discrimination in our society as we advance into the twenty-first century.

153. I have referred to these proponents of legislative solutions who rely on legal changes for achieving social justice as legislative romanticists because they neglect political concerns and structures necessary to implement legal change and continue to pursue legislation for social change without acknowledging the political difficulties in passing the legislation or in getting judges appointed by the political process to strengthen enforcement of such legislation even if it is passed. Green, *supra* note 142, at 958 n.109. As history has shown, even key legislative or legal action that has helped in bringing about social change has usually occurred at a time when the interests of those seeking change converged with those of the majority. *Id.* at 956-63. This interest-convergence theory was first articulated by Derrick Bell. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (“The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.”); Richard Delgado, *Explaining the Rise and Fall of African American Fortunes—Interest Convergence and Civil Rights Gains*, 37 HARV. C.R.-C.L. L. REV. 369, 371 (2002) (noting “an impressive insight by Derrick Bell that gains for blacks coincide with white self-interest and materialize at times when elite groups need a breakthrough for African Americans, usually for the sake of world appearances or the imperatives of international competition”).

154. Green, *supra* note 142, at 965-70.

155. Stipanowich, *supra* note 36, at 901, at nn.234-35. The survey reviews the comprehensive conflict resolution programs of the following companies: Alcoa, Anheuser-Busch, Bank of America, CIGNA, Credit Suisse First Boston, General Electric, Haliburton Company, Johnson & Johnson, Masco, McGraw-Hill, MG Company, Pfizer, Philip Morris USA, Rockwell Automation, Shell, Texaco, United Parcel Services, UBS Paine Webber, U.S. Air Force, and the U.S. Postal Service. *Id.* at 902-03 (Table 31 describing the nature of the ADR programs for each of the twenty companies).

156. *Id.*

But advocates for mediation should not expect it to deliver social justice because it is limited by the parties' mutual desires. Nor should mediation be employed as an attempt to quickly suppress conflict. Rather, a mediator must consider the needs and interests of the parties and allow procedural fairness to be an expectation of the process. The mediator should also explore the benefits to be derived from the conflict that has arisen and work with the parties in coming up with a mutually agreeable response to that conflict. In some instances, a settlement through mediation may not be the appropriate response to the conflict and the mediator should help the parties understand that.

At most, any notions of justice in mediation of employment discrimination disputes should be limited to procedural justice by allowing fair procedures and opportunities for voice.¹⁵⁷ As part of that procedural justice component, parties in mediation must have informed consent and not just sign away rights without understanding.¹⁵⁸ Furthermore, although mediation does offer value as a primary tool for resolving employment discrimination claims in this century, it should not be considered some magical elixir for all that ails enforcement of Title VII. Instead, it should only represent one form of dispute resolution in the toolbox that Title VII claimants can pursue rather than it presenting the end of court litigation by becoming the only tool in the toolbox.¹⁵⁹

V.

CONCLUSION

The 1990s saw the explosion of the use of mediation in resolving employment discrimination claims. Forty years after the passage of Title VII of the Civil Rights Act of 1964, many have evaluated the effectiveness of that law in eradicating discrimination in the workplace.¹⁶⁰ With the

157. See Welsh, *Decision Control*, *supra* note 84 (arguing that any attempts to focus on party control and determination in mediation must provide procedural justice guarantees in the design of any mediation system).

158. See Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle For Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 829 n.105 (1999) (highlighting the importance of making sure parties involved in mediation understand and consent to any agreements reached through mediation and that there are agreements are not based on coercion of weaker parties by the mediator or the other side); see also Weckstein, *supra* note 50, at 530-31 (describing the importance of informed consent and its compatibility "with the principle of self-determination").

159. See Green, *supra* note 142, at 958-70 (asserting that various forms of ADR, along with court litigation, should be considered in resolving Title VII claims but only as part of a comprehensive dispute resolution approach that recognizes the limitations of ADR and the court system, the unlikely political prospects for obtaining legal changes to the disputing process, and the possibility of converging interests of those seeking justice for workplace discrimination with companies' interests in employing a diverse workforce).

160. See, e.g., U.S. Equal Opportunity Comm'n, *Celebrating the 40th Anniversary of Title VII*, <http://www.eeoc.gov/abouteeoc/40th/panel> (last visited Oct. 15, 2005) (describing three separate panels

growth of mediation as a tool to resolve employment discrimination disputes, we must now look at how mediation impacts the effectiveness of Title VII. Some critics of mediation have referred to it as a system for the have-nots and a source of concern for those who need the formality and protection of the public dispute resolution process to achieve social justice. On the other hand, many supporters of mediation have emphatically asserted that it offers an opportunity to transform relationships and provide social justice for victims of discrimination who face significant difficulties in obtaining justice in the court system.

Nevertheless, a major component of mediation should be self-determination. Mediators operate as third parties who work with the disputants in reaching their own agreement. In some situations, true justice, as some critical race theorists have argued, cannot be delivered through informal and private dispute systems.¹⁶¹ In those situations, mediation can bring that point forward and the parties can decide to go seek a public and formal resolution to obtain the social and distributive justice they desire. Given the dismal results for employment discrimination claimants in the court system, mediation offers a fair alternative to explore a resolution without the difficulties of the litigation process.

Because of concerns about making mediators too powerful and not focusing on the self-determination of the parties, mediator actions in employment discrimination disputes should not be presumed to be about delivering social justice. Mediation of employment discrimination disputes should focus on what the parties want. No employment discrimination mediator should decide ahead of time that her job is to do justice between the parties or transform the parties' relationship because the goals of the parties would become subsumed by the mediator's goals.

This Article highlights a number of questions that academics have been raising about self-determination and mediator neutrality goals when juxtaposed with concerns of justice in employment discrimination disputes. However, the only real concern is what the mediator's orientation should be. The answer, in my opinion, is that mediators must focus on helping the parties achieve what they want. If what the parties want would offend the mediator's understanding of justice and possibly society's understanding of justice, the mediator may have no other option than to withdraw.

held to commemorate the 40th anniversary of Title VII). Other programs commemorating the 40th Anniversary of Title VII occurred in 2004. The Inaugural Wiley A. Branton-Howard Law Journal Memorial Symposium, Unfinished Business of the Civil Rights Act of 1964: Shaping an Agenda for the Next Forty Years was held at Howard Law School and it included articles by me (Green, *supra* note 142), and others, see David G. Clunie, *Letter From the Editor-In-Chief*, 48 HOWARD L.J. 815 (2005). A similar 40th Anniversary of Title VII symposium was held at Hofstra Law School which also included several articles. See Ruth Bader Ginsburg, *Introduction: The 40th Anniversary of Title VII of the Civil Rights Act of 1964 Symposium*, 22 HOFSTRA LAB. & EMP. L. J. 353 (2005).

161. See Bernard, *supra* note 8, at 140; Delgado, *Conflict as Pathology*, *supra* note 8, at 1402.

Given the private and informal nature of dispute resolution through mediation, notions of justice do not comport with society's goals of open vindication, judicial review, public scrutiny, and reliable legal precedent. By its nature and definition, mediation is not necessarily about distributive justice, unless the parties have designed it that way or let the mediator know that it is part of their goals. At most, mediators and academics who seem so concerned and focused about achieving justice in mediation, should realize that the only goal in mediation of employment disputes should be to assist the parties in reaching agreement in whatever way is legally and ethically possible for the mediator. Other than the mediator's own personal ethics and reality testing of what role the parties may want the mediator to play, notions of distributive justice should not play any major role in the mediator's orientation or approach. Maybe the only real goal of justice that can be consistently obtained through mediation is one of procedural justice,¹⁶² which would give employees a fair opportunity to have their voices heard. If procedural justice is not enough, then some other process should be used unless the parties can agree to incorporate additional components of justice into their conflict resolution process.

For an employer's mediation process to be fair and not just a form of second-class justice for have-nots, it must offer the following components: 1) encourage, expect and provide mechanisms for employees to obtain legal representation; 2) provide a critical mass of mediators of color and women as a qualified cadre of mediators that employees of color and female employees can realistically select to mediate their employment discrimination disputes; 3) allow employees some role in the design of procedures that will constitute the framework for conducting the mediation; 4) require that mediators determine the goals and interests of the parties in each individual dispute, and as long as those goals do not present any ethical concerns, the mediator should actively help the parties resolve their conflict in a way that matches their goals; and 5) allow employees to seek additional forms of dispute resolution relief, including the right to go to court if mediation or other informal methods do not work.

Employers and employees have a vested interest in providing a fair conflict resolution system and in eradicating workplace discrimination in an increasingly diverse society. One commentator recently explained how the benefits of mediation in handling employment discrimination claims can operate fairly without it just being a mechanism for stronger employers to suppress their weaker employees' legitimate claims:

Mediation is not meant to give every party a shield behind which to hide and distort their discrimination into something palatable. Its purpose is

162. Stempel, *Fuzziness*, *supra* note 16, at 348 (criticizing any focus on having mediators try to focus on the "power differential" and asserting instead that they focus on "fairness" in the process).

instead to provide each party with a sword and a shield. The sword operates to increase the empowerment of parties, allowing them to fully articulate and assign values to their interests. It strengthens weaker parties by giving them the opportunity to tell their own stories in their own voices, bringing in whatever ancillary events they feel are important to fully round out the narrative, whether or not the events are legally relevant. Behind the shield the parties have the opportunity to listen carefully to the narrative coming from the other side and to spend the time and emotional energy necessary to allow themselves to recognize the opponent's shared humanity.¹⁶³

Therefore, mediation, if used appropriately, can be an effective tool to tackle employment discrimination when the components of the mediation conflict resolution program provide an opportunity for fairness for the have-nots without merely serving as a shield for the haves.

EPILOGUE: We now return to the situation of Walter's mediation. Recognizing that outsiders may look in and feel that Walter should receive compensatory and punitive damage relief given the appearances of his claim, the mediator must make sure that Walter seeks legal advice or, at a minimum, that he understands through informed consent that he is giving up on those potential remedies. What the mediator should not do is impose her goals and feelings about justice on Walter. As long as the mediator believes that Walter understands his actions and still has a strong interest in ending his dispute in a way that stops the harassment and provides him with an apology, no third party mediator should decide that Walter has made a mistake in not seeking more from the employer before reaching an agreement. If the result appears harsh to Walter in terms of applying legal norms, we must remember that mediation involves too many private components that do not comport with public or societal notions of justice, including the primary focus on party self-determination.

Although Walter's satisfaction has been achieved, his settlement may not help his employer eradicate workplace discrimination. Also, his settlement might set a bad precedent for that employer who may think that other employees in Walter's situation may be willing to have a similar final resolution. Walter may not have any concern about others when deciding to resolve his dispute. Further, if his employer is unwilling to agree to additional terms that might resemble what Walter could obtain in court, and Walter believes it is important to obtain those terms, then Walter may pursue his claim in court.

If the mediator has focused on what the parties want and not tried to force a particular approach or result on the parties or tried to deliver her own beliefs as to what workplace justice should be in this dispute, but allowed for procedural justice including allowing voice and dignity to operate throughout the process, the mediator has done all that she need do.

163. Butcher, *supra* note 41, at 290.

Any expectations of justice beyond that result would have to occur through some other proceeding where an outside decision maker can assess the appropriate distributive and social justice result and determine what legal norms should apply. For the one-shot have-nots, like Walter, who have informed consent and want to make their own decisions about how their employment discrimination disputes get resolved, mediation can help them effectively resolve their claims. For the repeat-player haves, like Walter's employer, mediation should not represent a shield to suppress legitimate conflicts from seeing the light of public resolution. Rather, through working with Walter and the mediator, it allows the haves to determine their results without being worried about the uncertainties of an outside decision maker through the court system.

